

THE FEDERAL CIRCUIT’S GREAT DISSENER
AND HER “NATIONAL POLICY OF FAIRNESS
TO CONTRACTORS”

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I. INTRODUCTION

During her tenure on the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), Judge Pauline Newman has dissented in a remarkable series of appeals implicating important rights of government contractors. Her dissents represent such a significant percentage of contract-related appeals in which she participated that the government contracting legal community may appropriately view her as the Federal Circuit’s “great dissenter.” These dissents respectfully but emphatically criticize her colleagues for not recognizing legitimate interests of contractors and citizens seeking remedies from the Government. The opinions consistently reflect the view that a primary responsibility of the court is to serve “the national policy of fairness to contractors.”¹

This theme runs through opinions dealing with a broad range of issues, such as jurisdiction, statute of limitations, authority, implied contracts, sovereign acts, illegal contracts and provisions, interest, award protests, government duties, contract interpretation, superior knowledge, release and waiver of claims, and remedies. The dissents give close attention to basic contract law, to applicable precedent, and to appropriate standards of appellate review, demonstrating a precise judicial approach, but invariably argue fundamentally that contractors should be afforded their “day in court” and “fair” treatment. Seeking to hold the Government accountable for its conduct, Judge Newman is plainly skeptical about the reach of sovereign immunity and the extent of government prerogatives when they bar a fair and just result.

These dissents demonstrate the coherence of her specialized judicial philosophy and are noteworthy for that reason alone. But her dissents are also worthy of study for the additional reason that, given their persistence, they declare a responsible, nonpartisan view that the Federal Circuit has inappropriately moved the balance of its government contract jurisprudence toward protecting the sovereign and the public fisc.

II. THE BASIS FOR THE “FAIRNESS” POLICY

Judge Newman does not provide a citation for the “national policy” she invokes. Her dissents seem almost to assume such a purpose, as if it could not

1. A policy she explicitly invoked in one of these dissents. See *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1383 (Fed. Cir. 2004) (Newman, J., dissenting).

be otherwise. She could have cited the Federal Acquisition Regulation (FAR), which states as a “guiding principle” that the Government will “[c]onduct business with integrity, fairness, and openness.”² But the source appears to be jurisprudential, rather than regulatory.

Judge Newman was appointed to the first vacancy on the Federal Circuit after it replaced and subsumed the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals.³ Although she had been a leader in the corporate patent bar, she surely became knowledgeable about the historic function of the Court of Claims. The role of the court has been chronicled in a court-authorized history, authored in significant part by Judge Marion Bennett, a former Court of Claims judge and a colleague on the new court.⁴ In Judge Bennett’s words, the Court of Claims history embraced its special role in the relations between the Government and its citizens:

A unique and permanent contribution that the Court of Claims has made over the span of its long life as a public institution is in how it helps make Government officials accountable to the citizens whose servants they are, but whose relationship to their masters is sometimes forgotten. In helping to inspire a high standard of conduct for Government officials, it serves the nation well. If there is a constant thread running through the court’s decisions, it would seem to be in holding the Government and its officials to a strict code of conduct in their relations with citizens. . . . [I]t is a special responsibility for a court created as the main forum for claims against the sovereign.

....

Such a court is the flower of a free society.

....

Indeed, this nation without the Court of Claims would be hard to conceive if we continue to accept President Abraham Lincoln’s premise:

It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.

In this role, it has been said of the Court of Claims: “It holds and speaks a nation’s conscience.” The court has accepted these definitions of its mission.⁵

In Judge Bennett’s definition of this charter of the Court of Claims itself lies the “national policy of fairness” to claimants, including government contrac-

2. FAR 1.102(b)(3).

3. See *Biography of Judge Pauline Newman*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=126:pauline-newman-circuit-judge&catid=1:judges&Itemid=24 (last visited Oct. 10, 2010).

4. See generally 2 WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY* (1978).

5. *Id.* at 170–72 (quoting Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861); 48 Ct. Cl. 25 (1913)).

tors, which Judge Newman has invoked while sitting in the successor Federal Circuit.

III. THE DISSENTS

Notwithstanding this “constant thread,” Judge Newman’s dissents each has a unique story to tell—some shorter, some longer than others—so it seems the best way to develop the thread is to present the most noteworthy of them in chronological order. What follows, therefore, are analyses of twenty-two cases, decided between 1991 and 2010,⁶ sufficiently detailed to allow the reader to understand the competing views, to make his or her own judgments, and perhaps to reach some conclusions about the significance of her ongoing dialogue within the Federal Circuit.

A. 1991—GAF Corp. v. United States

In *GAF Corp. v. United States*, an asbestos insulation manufacturer sought recovery for damages sustained as a result of tort actions by workers at Navy shipyards.⁷ The Claims Court⁸ granted summary judgment, rejecting GAF’s claim that the Government was accountable because it had, but did not disclose, superior knowledge of the health hazards involved.⁹ The Claims Court held, as a matter of law, that the Navy had no contractual duty to warn an asbestos producer of hazards in its own product.¹⁰

On appeal, the panel majority¹¹ agreed, relying on *Lopez v. A.C. & S., Inc.*, a decision it described in this way:

6. Not included are the following noteworthy cases in which Judge Newman dissented in this period: *Avtel Servs., Inc. v. United States*, 501 F.3d 1259, 1260 (Fed. Cir. 2007) (bankruptcy of protester does not moot or eliminate jurisdiction); *Fisherman’s Harvest, Inc. v. PBS & J*, 490 F.3d 1371, 1379 (Fed. Cir. 2007) (appropriate transfer to the Court of Federal Claims where “ultimate liability” is that of United States); *Barclay v. United States*, 443 F.3d 1368, 1379 (Fed. Cir. 2006) (takings claim does not accrue for limitations purposes based on possibility); *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1325 (Fed. Cir. 2003) (FAR 15 rewrite does not justify unfair procedure); *BenJu Corp. v. United States*, No. 98-1174, 1999 WL 3335, at *4 (Fed. Cir. Jan. 4, 1999) (absence of government claim for repayment “during any reasonable period of time”); *Hubsch Industrieanlage Spezialbau, GmbH v. United States*, No. 96-5119, 1997 WL 337557, at *5 (Fed. Cir. June 20, 1997) (both sides contributed to breakdown of arrangement; too many factual disputes for summary judgment); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1566 (Fed. Cir. 1996) (admitted violation of law cannot be ignored; terminated contract cannot be reawarded without prejudice to competitors); *Interwest Constr. v. Brown*, 29 F.3d 611, 618 (Fed. Cir. 1994) (where all bidders read specification in same way, unwarranted to find a patent ambiguity, raising duty to inquire).

7. *GAF Corp. v. United States (GAF Corp. II)*, 932 F.2d 947, 948 (Fed. Cir. 1991).

8. The Claims Court replaced the trial function of the Court of Claims. Subsequently, it was renamed the Court of Federal Claims (“COFC”). See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4516 (1992).

9. *GAF Corp. v. United States (GAF Corp. I)*, 19 Cl. Ct. 490, 503 (1990).

10. See *id.* at 504.

11. Judges Rader and Rich.

This court in *Lopez* reasoned that the superior knowledge doctrine does not impose on a customer the duty to inform an experienced producer that its products are hazardous. . . . GAF, like the asbestos producers in *Lopez*, in effect asserted “not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he [the supplier] does not already know.” This additional duty does not “fit” the superior knowledge doctrine. Indeed the doctrine does not impose on a buyer an affirmative duty to inquire into the knowledge of an experienced seller.¹²

On this basis, the panel majority held that “the Claims Court correctly determined that GAF’s showings did not create a triable issue.”¹³

Judge Newman’s dissent focused on GAF’s specific and documented assertions of fact, which created a “factual distinction from the premises of our decision in *Lopez*.”¹⁴ GAF “proffered evidence that shows, on its face, that at the time the government contracted with Rubberoid the Navy actively suppressed knowledge that was significantly superior to that available from any other source, and instead allowed misleading information to be published” and also “proffered affidavit evidence positively averring Rubberoid’s lack of knowledge as to the hazardous conditions created by the Navy’s misuse of asbestos products.”¹⁵ Judge Newman concluded that “*Lopez* did not establish a general rule that encompasses these facts. GAF thus was entitled to establish the actual factual situation.”¹⁶ Summary judgment was therefore inappropriate.¹⁷

Judge Newman’s excerpts from the Navy’s classified documents helps one understand why she was unwilling to accept her colleagues’ broad pronouncement of law as dispositive.¹⁸ One such document stated: “Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting as well as we should. This is a matter of official report from several of our Navy Yards.”¹⁹ In contrast to this and other classified reports,²⁰ the Navy released a report that downplayed the hazards of asbestos use in the Navy: “The incidence of asbestosis among pipe coverers in the shipyards studied was low. . . . In view of the nature of shipyard pipe covering work, this low incidence is not surprising.”²¹

Judge Newman’s indignation at these documented facts is not masked by her judicious language and limited conclusion that the GAF assertions of fact had to be tried:

12. *GAF Corp. II*, 932 F.2d at 949 (alteration in original) (quoting *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 717–18 (Fed. Cir. 1988)).

13. *Id.*

14. *Id.* at 951 (Newman, J., dissenting).

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* at 951–52.

19. *Id.*

20. *See id.*

21. *Id.* at 952 (omission in original).

In this case, GAF has proffered factual support not provided in *Lopez*, pointing out that the government monitored the health hazards, knew of the significant health risk to which it knowingly subjected its employees, classified the results as military secrets, and released misleading public information in its stead. For purposes of summary judgment we must accept these allegations as true.²²

GAF was therefore entitled at least “to establish the actual factual situation,” not to be frustrated by summary judgment based on a cramped and fact-free application of the superior knowledge doctrine.²³

B. 1991—Emerald Maintenance, Inc. v. United States

The *Emerald Maintenance* appeal involved roofing contracts awarded in September 1985 with a Davis Bacon Act Wage Determination that turned out to be defective.²⁴ The Wage Determination conflicted with a controlling local area practice that required all employees who worked on roofs as part of a roofing contract be classified as “Roofers.”²⁵ The Wage Determination classified some as “laborers” with lower rates and fringe benefits. The government estimate and Emerald’s bid were based on the incorrect wage determination. The parties stipulated that neither was aware of the area practice at the time the contracts were executed.²⁶ In September 1986, after a Labor Department investigation, the Contracting Officer (CO) notified Emerald of the area practice and requested restitution payments to the underpaid workers. Subsequently the CO withheld \$110,104 and paid this money to the workers according to the higher rates.²⁷

Emerald submitted a claim for the withheld money, not because the employees were not entitled to the higher compensation, but on these alternative theories: (1) the Wage Determination amounted to a defective specification in the contract, (2) the Government misrepresented what the workers could be paid, and (3) the parties, not knowing of the area practice, were mutually mistaken.²⁸

The panel majority²⁹—affirming the Armed Services Board of Contract Appeals (“ASBCA” or “Board”)—ruled that the defective specification and misrepresentation counts were not within the Board’s Contract Disputes Act (“CDA”) jurisdiction and were appropriately dismissed.³⁰ The basis for this holding was the “Disputes Concerning Labor Standards” clause, which stated that “[d]isputes arising out of the labor standards provisions of the contract shall not be subject to the general Disputes Clause of the contract.”³¹

22. *Id.* at 953.

23. *Id.* at 951.

24. *See Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1426–27 (Fed. Cir. 1991).

25. *See id.* at 1427.

26. *Id.*

27. *Id.*

28. *See id.*

29. Judges Lourie and Nies.

30. *See Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1430 (Fed. Cir. 1991).

31. *Id.* at 1428 n.2 (ostensibly superseding the Contract Disputes Act, 41 U.S.C. §§ 601–613 (1988)).

Notwithstanding the broad jurisdictional grant of the CDA (“any appeal from a decision of a contracting officer . . . [relating] to a contract”), the panel majority explained that “in the specific Disputes provision of the contracts, appellant agreed that disputes over labor standards are *not* to be subject to the general disputes clause.”³² Relying on “little doubt” about its “objective reading” and the “well established” rule that “the specific governs over the general,” the majority concluded that the claims could only be adjudicated “in accordance with procedures of the Department of Labor.”³³

With respect to Emerald’s mutual mistake claim, the majority relied on the “very clear” language of “Site Investigation and Conditions Affecting the Work” clause, to hold that the risk of this mistake was cast upon the contractor.³⁴ Thus, “[t]he government [was] not responsible for Emerald’s inadequate investigation.”³⁵

Judge Newman’s dissent directly confronted the majority’s conclusions:

While Emerald does not and can not contest in this action the correctness of the Department of Labor’s determination of area practice, requiring that the laborers’ work in the Davis-Bacon schedule be paid at the roofers’ rate, neither the contracts between Emerald and the agency, nor the operation of law, absolves the agency of liability for increased wages it retroactively required the contractor to pay. On the contractor’s legal theories of mutual mistake, defective specifications, or misrepresentation, the contractor is entitled to relief.³⁶

Citing regulations and precedents not mentioned in the majority opinion, the dissent explained why the majority was wrong on both its jurisdictional and assumption of risk rulings.

As to the jurisdictional dismissal of the defective specification and misrepresentation claims, Judge Newman wrote:

[W]hether or not there was a “Dispute Concerning Labor Standards” between Emerald and the Department of Labor, that issue is unrelated to the dispute between Emerald and the contracting agency concerning liability for increased cost of performance due to the change by the government in the contracts’ wage and classification terms.³⁷

The dissent cited ASBCA precedent for this distinction and the conclusion that Emerald’s claim was subject to the CDA.³⁸ Judge Newman cited Court of Claims precedent granting relief where “[t]here consequently was a misrepresentation by defendant, perhaps an innocent one, as to the prevailing wage rate for unskilled laborers, but one upon which plaintiff relied.”³⁹

32. *Id.* at 1429 (citing 41 U.S.C. § 607(d)).

33. *Id.* The opinion did not address whether the Department of Labor procedure provided for resolution of disputes about contractual responsibility for an erroneous wage determination.

34. *Id.* at 1430, 1433.

35. *Id.* at 1430.

36. *Id.* at 1430–31 (Newman, J., dissenting).

37. *Id.* at 1431 (citation omitted).

38. *See id.* (“Rather, the dispute concerns who is to bear the burden of increased wages and fringe benefits. This is a matter properly before the Board for resolution.” (quoting Ralph Constr., Inc., ASBCA No. 35633, 88-2 B.C.A. (CCH) ¶ 20,731, at 104,756)).

39. *Id.* at 1432 (quoting *Poirer & McLane Corp. v. United States*, 128 Ct. Cl. 117, 126 (1954)).

The most persuasive feature of the dissent is Judge Newman's quotation of the regulations assigning responsibility to *the contracting agency* for "insuring that only the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications," and, further, for taking appropriate action when a wage determination is corrected after award.⁴⁰ Title 29 C.F.R. § 1.6(a)(2)(f) specified that, in the event the Davis Bacon administrator issues a corrected wage determination:

the [contracting] agency shall . . . incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, *Provided* That the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.⁴¹

As Judge Newman commented, "[t]his assigned responsibility is a determining factor in Emerald's dispute, for it is specific to the issue in dispute."⁴²

Not only did the regulation establish the "procurement" (rather than labor relations) nature of the dispute, thus appropriately to be resolved under the CDA, the regulation undermined the majority's analysis of the assumption of risk issue.⁴³ Judge Newman discounted the majority's reliance on the "Site Investigation and Conditions Affecting the Work" clause: "This clause is specific as to certain site conditions, and states the consequences of failure to reasonably investigate the site. There is no mention of wage classifications."⁴⁴

While the majority found the Site Investigation clause dispositive, she disposed of the risk allocation issue by stating that, under the specific terms of 29 C.F.R. § 1.6(a)(2)(b), "it is the agency that is 'responsible for insuring' the correctness of the wage determinations."⁴⁵

Judge Newman then cited a string of cases to establish that "[t]he law that applies in this situation is settled."⁴⁶ Among these precedents was *Black, Raber-Kief & Assoc. v. United States*: "It is settled that, where the Government requires a contractor to pay higher wages than he was obligated to pay under his contract, the United States is liable for the additional costs."⁴⁷

Given her detailed, well-supported analysis, it is understandable that Judge Newman dissented from the majority's refusal to hold the Government accountable for the erroneous wage determination.⁴⁸

40. *Id.* at 1432–33 (quoting 29 C.F.R. § 1.6(a)(2)(b), (f) (1989)).

41. *Id.* (emphasis supplied) (quoting 29 C.F.R. § 1.6(a)(2)(f)).

42. *Id.* at 1433.

43. *Id.*

44. *Id.*

45. *Id.* at 1433–34 (quoting 29 C.F.R. § 1.6(a)(2)(b)).

46. *Id.* at 1434.

47. *Id.* (quoting *Black, Raber-Kief & Assocs. v. United States*, 357 F.2d 355, 361 (Ct. Cl. 1966)).

48. In an unusual footnote, the majority responded to the dissent, noting—but not discussing or distinguishing—her citation of "cases and regulations assigning that risk of the government." However, the footnote has an *ipse dixit* quality by merely repeating the majority's initial propositions. *Id.* at 1430 n.3 (majority opinion).

C. 1991—United States v. Grumman Aerospace Corp.

This appeal involved a panel decision, initially issued as nonprecedential, that the ASBCA lacked jurisdiction because the contractor's claim had not been certified by an appropriate official as described in the regulations implementing the CDA's requirement that "the contractor" certify the claim.⁴⁹ Grumman's certificate had been signed by its senior vice president and treasurer.⁵⁰ The regulation, 48 C.F.R. § 33.207(c)(2), required a certification from either "(i) [a] senior company official in charge at the contractor's plant or location involved; or (ii) an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."⁵¹

The original panel required that the Board's decision on the merits in favor of Grumman be vacated and the appeal dismissed for lack of jurisdiction.⁵² When the Government successfully sought to have the decision made precedential, four judges dissented from the court's "refusal to consider the case in banc and to affirm the [ASBCA's] jurisdiction to decide the case."⁵³ Judge Newman was one of the judges joining in this dissent authored by Judge Plager.⁵⁴ The dissent is important to understand Judge Newman's government contract jurisprudence because it shows where she stood on the jurisdictional snarl created by the court's unquestioning acceptance of the claims-defining regulations promulgated by the Government, as determinative of jurisdiction under the CDA.

The CDA established jurisdiction based on appeal from the denial of a "claim" but did not define "claim."⁵⁵ The regulations added many special attributes to the normal meaning of "claim," including that the claim be certified and further that it be certified by defined contractor officials, before it could be considered a "claim" within the meaning of the CDA.⁵⁶ Because the court also held that subject matter jurisdiction depended on these requirements,⁵⁷ deference to the regulations disrupted the efficient dispute-resolution process intended by the CDA, as it did in the *Grumman* case.

The dissenters characterized the panel's pronouncement as "not good law."⁵⁸ Deference to the regulation was not necessary or appropriate because "[t]he term 'contractor' as used in . . . the Contract Disputes Act ('CDA') is not ambiguous."⁵⁹ The dissent suggested that the regulation, "by limiting the

49. See *United States v. Grumman (Grumman I)*, 927 F.2d 575, 577–78, 581–82 (Fed. Cir. 1990) (citing 41 U.S.C. § 607(c)(1) (1988)), cert. denied, 502 U.S. 919 (1991).

50. See *id.* at 577.

51. *Id.* at 578 (quoting FAR 33.207(c)(2) (1989)).

52. See *id.* at 577.

53. See *id.* at 581 (Plager, J., dissenting).

54. See *id.*

55. See 41 U.S.C. § 607(d) (1988); *Grumman I*, 927 F.2d at 579–80, 583–84.

56. See *Grumman I*, 927 F.2d at 578 (majority opinion).

57. See *id.* at 580.

58. *Id.* at 582 (Plager, J., dissenting).

59. *Id.*

range of officials able to certify as narrowly as it does, goes beyond reasonable interpretation.”⁶⁰ In the dissenters’ view: “The statute delegates to the contractor the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad reasons of corporate organizational structures.”⁶¹ The dissenters also explained the dangers inherent in the panel’s decision, which

sets a trap for the unwary, requiring that claims falling short of its technical trap be restarted, thus giving the Government more years to avoid paying its just debts, if they are ultimately found to be just, and to deny to contractor the interest on the money due that the statute requires to be paid. . . . This court should not countenance any such distortion of the remedial purposes of the Contract Disputes Act.⁶²

Finally, the dissenters lamented missing the “opportunity to correct . . . a long-standing error” of the court’s own making, which linked the jurisdiction of the boards and courts to the proper certification of the claim.⁶³ “A party’s failure to do all that is required to certify a claim goes only to that party’s entitlement to relief,” not jurisdiction.⁶⁴ “To confuse the two creates not only analytical difficulties but practical ones as well.”⁶⁵ The dissenters concluded with a statement that would have been endorsed by most in the government contracts bar: “This whole area could benefit from a thorough reexamination en banc.”⁶⁶

D. 1993—Winstar Corp. v. United States

The *Winstar* case is, of course, well known for the Supreme Court decision that rejected the Government’s sovereign act defenses and sustained claims by banks that the Financial Institutions Reform, Recovery, and Enforcement Act’s (“FIRREA”)⁶⁷ regulatory capital requirements breached contracts by repudiating the regulatory treatment of “supervisory goodwill” promised by the Federal Housing Loan Bank Board (“FHLBB”) in connection with the acquisition of failing thrifts.⁶⁸ Not as well-known is Judge Newman’s role in the history of this litigation. Her dissent in the initial Federal Circuit decision led to a rehearing en banc and anticipated the Supreme Court’s ultimate ruling.⁶⁹ As such, Judge Newman’s *Winstar* dissent is rare because it ultimately

60. *Id.*

61. *Id.* at 582–83.

62. *Id.* at 583.

63. *Id.*

64. *Id.* at 583–84.

65. *Id.* at 584.

66. *Id.* In Pub. L. No. 102-572, 106 Stat. 4518 (1992), Congress legislatively overruled this decision by providing that the certificate could be executed by any person authorized by the contractor and that a defective certificate would not deprive a court or board of jurisdiction. See 41 U.S.C. § 605(c)(6)–(7) (2006).

67. 12 U.S.C. § 1464 (2006).

68. *United States v. Winstar Corp. (Winstar III)*, 518 U.S. 839 (1996).

69. See *Winstar Corp. v. United States (Winstar I)*, 994 F.2d 797, 813–19 (Fed. Cir. 1993) (Newman, J., dissenting), *judgment vacated, reb’g & reb’g en banc granted*, 64 F.3d 1531 (Fed. Cir. 1995), *aff’d*, 518 U.S. 839 (1996).

prevailed—and can be said to have had a significant impact on the Federal Circuit’s contract jurisprudence.

In the initial Federal Circuit decision, the panel majority⁷⁰ reversed the COFC and rejected the banks’ contract claims. *Winstar*⁷¹ had alleged that the FHLBB induced it to take over a failing bank by promising to allow accounting for the balance sheet shortfall of the failing bank as “supervisory goodwill,” to be amortized over an extended period of time.⁷² The FHLBB’s purpose was to avoid government liability to depositors of the failed bank by encouraging the acquisitions in this way.⁷³ Subsequent to these promises and the resulting bank transactions, FIRREA prohibited this regulatory accounting, leaving *Winstar* itself out of compliance and forcing it into receivership.⁷⁴ *Winstar* claimed breach of contract, but the Government asserted that the enactment of FIRREA and its enforcement constituted a sovereign act, not subject to redress.⁷⁵

The panel majority agreed.⁷⁶ The majority concluded that “FIRREA’s capital reforms [were] ‘general and public’ acts to which the Sovereign Acts Doctrine applies.”⁷⁷ Thus, the Government’s “characters . . . as a contractor and as a sovereign cannot be . . . fused” to cause contractual liability for such sovereign acts.⁷⁸ The majority also addressed the question of whether the agreement required “the Bank Board to measure regulatory capital in a manner inconsistent with what Congress later required in FIRREA.”⁷⁹ Applying the “unmistakability” doctrine, the majority ruled the contract did not confer an immunity “from the effect of future changes in law . . . in unmistakable terms.”⁸⁰ Accordingly, the majority held that *Winstar* “assumed the risk that the law would change.”⁸¹

Judge Newman dissented that the issue was not whether Congress had the power to enact FIRREA and foreclose contract performance, but rather the financial consequences of these acts.⁸² She noted, “The [COFC] did not make the mistake of confusing the government’s right to legislate in the public interest with the government obligations in specific contractual commitments. This distinction is a necessary implementation of the principles by which our government does business with its citizens.”⁸³

70. Chief Judge Nies and Judge Rich.

71. And other banks whose cases were joined. *See, e.g.*, *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 906 (1992).

72. *Winstar I*, 994 F.2d at 802.

73. *Id.*

74. *Id.* at 805.

75. *Id.* at 818 (Newman, J., dissenting).

76. *See id.* at 808 (majority opinion).

77. *Id.*

78. *Id.* (quoting *Horowitz v. United States*, 267 U.S. 458 (1925)).

79. *Id.* at 809.

80. *Id.*

81. *Id.* at 811.

82. *Id.* at 814 (Newman, J., dissenting).

83. *Id.* at 817.

She described the majority rationale as apparently that “the government may abrogate contracts without liability” based on the “sovereign acts doctrine.”⁸⁴ In contrast, it was “quite clear” to Judge Newman that “the sovereign acts doctrine does not mean that the government can walk away from any contract to which it is a party, avoiding all contract liability, whenever there is intervening legislation or regulatory action.”⁸⁵ She commented that “governmental responsibility is not a new idea in this nation’s law”⁸⁶ and sovereign acts are “not a boundless justification for government non-liability.”⁸⁷

Her dissent stressed the bargaining of the contracts, the essentiality of the Government’s commitments, and the financial benefits to the Government.⁸⁸ She chided the Government’s posture:

The government’s disavowal of having made binding contracts comes with poor grace, not only in view of the government’s encouragement of these arrangements when they were made, but also because performance was accepted by the government for several years.⁸⁹

The legislation, she pointed out, was enacted with specific knowledge and expectation that it would interfere with performance of specific contracts by changing the rules of capital compliance.⁹⁰ Indeed, as she reported, the legislative committees had specifically requested opinions on the Government’s exposure for breach and “received inconsistent advice”: GAO said that there could be liability, while the Department of Justice said that there could be no resulting claims.⁹¹ This “foreseen and intended consequence” of FIRREA and its regulatory implementation “negat[ed] immunity as a sovereign act.”⁹² “That the government may be empowered to legislate this way, and that a desired public policy is served,” she wrote, “does not mean that it can be done without liability to those with whom the government had made a different commitment.”⁹³

The panels’ split-decision led in turn to an en banc review and decision, joined in by Judge Newman, which upheld the breach claims.⁹⁴ The en banc court concluded that the relevant sections of FIRREA were directed at the “supervisory goodwill” accounting in the acquiring banks’ thrifts’ contracts: “Thus, thrifts that underwent a supervisory merger . . . are singled out for special treatment by the statute . . . [which] quite specifically abrogates agree-

84. *Id.* at 814.

85. *Id.* at 815.

86. *Id.* at 814.

87. *Id.* at 815 (internal citations omitted).

88. *See id.* at 816.

89. *Id.*

90. *See id.* at 818–19.

91. *Id.* at 816.

92. *Id.* at 817. Alternatively, Judge Newman took the position that “even if the enactment of FIRREA were treated as a sovereign act it would be incorrect to place on these banks the entire burden of impossibility of performance of their contracts, as has been done here.” *Id.* at 818.

93. *Id.* at 819.

94. *Winstar Corp. v. United States (Winstar II)*, 64 F.3d 1531, 1551 (Fed. Cir. 1995).

ments the government had made at an earlier time . . . to avoid bailing out failing thrifts.”⁹⁵ On this basis, the en banc court concluded that, “[a]lthough the government was free to legislate, it remain[ed] liable for breach of contract where its legislation [was] directed at repudiating its prior contractual agreements.”⁹⁶

The Supreme Court affirmed with a mixture of rationales, none representing a majority, divided among seven justices.⁹⁷ The plurality announced the judgment of the Court: “Although Congress subsequently changed the relevant law, and thereby barred the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach.”⁹⁸ Interestingly, Justice Souter’s opinion essentially adopted Judge Newman’s rationales.⁹⁹ In so doing, Justice Souter applied and reminded the Government of a long-standing principle of Government contract law also cited in Judge Newman’s dissent:

An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any “regulating statute” would flout the general principle that, “[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”¹⁰⁰

E. 1994—*Wilner v. United States*

Not surprisingly Judge Newman also joined in Judge Bennett’s dissent in one of the Federal Circuit’s most controversial decisions under the CDA.¹⁰¹ In *Wilner v. United States*, Judge Bennett and Judge Newman initially joined in a majority panel ruling that a Contracting Officer’s finding of 260 days’ excusable delay could properly be considered as a strong evidentiary admission, raising a rebuttable presumption, notwithstanding the CDA’s requirement for a de novo proceeding and admonition that the CO’s findings “are ‘not binding.’”¹⁰² Judge Schall dissented, contending that any consideration of the CO’s decision on the extent of compensable delay was inconsistent with his reading of the CDA and its requirement for a de novo proceeding.¹⁰³

95. *Id.* at 1549–50.

96. *Id.* at 1551.

97. *See generally Winstar III*, 518 U.S. 839 (1996). Chief Justice Rehnquist dissented, with Justice Ginsburg joining.

98. *Id.* at 843.

99. *See id.* at 891–96, 904–10.

100. *Id.* at 895 (alteration in original) (emphasis added) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

101. *See Wilner v. United States (Wilner II)*, 24 F.3d 1397, 1403 (Fed. Cir. 1994) (en banc). The court’s majority opinion was written by Judge Schall.

102. *Wilner v. United States (Wilner I)*, 994 F.2d 783, 786, 788 (Fed. Cir. 1993), *vacated*, 24 F.3d 1397 (Fed. Cir. 1994).

103. *Id.* at 789 (Schall, J., dissenting).

When the matter was considered en banc, the rest of the court sided with Judge Schall,¹⁰⁴ prompting the Bennett-Newman dissent. That dissent, drawing heavily on Judge Bennett's historical perspective, chided the en banc majority for misinterpreting the CDA; not understanding de novo practice prior to the CDA; not recognizing the proper, nonbinding function of evidentiary admissions in de novo proceedings; and disregarding prior Court of Claims precedent.¹⁰⁵ And it also added these thoughts about policy implications:

Indeed the court has now overruled longstanding precedent, to the direct detriment of those who do business with the government.

....

To disregard the Contracting Officer's evidence would be absurd, not to mention a tremendous waste of government and contractor litigation effort.

....

I am at a loss to understand the majority's requirement that despite this undisputed governmental admission, the contractor must now introduce the raw data on which the [CO] relied.

....

This court's requirement . . . will price litigation with the government out of reach, to the disservice of those who are willing to serve the government.¹⁰⁶

F. 1994—*West Coast General Corp. v. Dalton*

This case involved two claims sent to the Resident Officer in Charge of Construction ("ROICC"), not to the CO.¹⁰⁷ The CO denied Claim I after it was forwarded to him by the ROICC, whereupon the contractor appealed the denial to the COFC.¹⁰⁸ The COFC granted the Navy's motion to dismiss for lack of jurisdiction because the contractor had not directly "submitted a proper claim to the contracting officer under the [CDA]," rendering the final decision "invalid."¹⁰⁹

While this was going on, Claim II was also submitted to the ROICC and denied by the CO after receiving it from the ROICC.¹¹⁰ However, during the ostensible appeal period, the COFC announced the final decision on Claim I.¹¹¹ Thereafter, the contractor and the Navy engaged in settlement discussions, proceeding in accordance with the COFC decision on the prem-

104. See *Wilmer II*, 24 F.3d at 1398.

105. *Id.* at 1404–05 (Bennett, J., dissenting).

106. *Id.* at 1404–06.

107. *W. Coast Gen. Corp. v. Dalton (West Coast II)*, 39 F.3d 312, 313–14 (Fed. Cir. 1994).

108. *Id.* at 314.

109. *W. Coast Gen. Corp. v. United States (West Coast I)*, 19 Cl. Ct. 98, 101 (1989).

110. *West Coast II*, 39 F.3d at 314.

111. *Id.*

ise that “West Coast might be required to resubmit [to the CO] a request for final decision on [Claim II] and have a new final decision issued if settlement was not reached.”¹¹² However, when the contractor subsequently resubmitted Claim II, the CO refused to consider it. The Navy had changed its position, now stating that “[no one] with appropriate authority ever [agreed] that subject contracting officer’s final decision [became] a nullity as a result of the [COFC decision]. Accordingly, [Claim II] will not be reconsidered and the previously rendered final decision remains in effect.”¹¹³

Unfortunately for West Coast, the appeal period from the “previously rendered” CO’s decision had, by this time, already expired.¹¹⁴ It was also unfortunate that, by the time Claim II reached the Federal Circuit, the COFC’s precedent had been overruled in *Dawco Construction, Inc. v. United States*, which held that the CDA permitted a claim to be sent through the ROICC.¹¹⁵

The Federal Circuit’s panel majority,¹¹⁶ applying *Dawco* retrospectively, held there was no CDA jurisdiction because West Coast’s appeal was untimely.¹¹⁷ The majority explained its position:

The [COFC’s] intervening, and incorrect, decision in *West Coast I* does not alter this result. [COFC] decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court. Thus, a [COFC] decision directed to one claim brought by a party does not create binding precedent for a separate claim—even a separate claim from the same party.¹¹⁸

West Coast “therefore had no legal basis for its reliance on *West Coast I*” in its decision not to appeal the CO’s apparently invalid denial of Claim II.¹¹⁹

Judge Newman responded with a vigorous dissent, characterizing the Navy’s change of position as “unwarranted, unfair, and contrary to principles of judicial review.”¹²⁰ She explained that the Federal Circuit was not required to apply *Dawco* retroactively to override “the existing law of the Court of Federal Claims.”¹²¹ Indeed, “comprehensive guidance” from the Supreme Court should have persuaded the court not to apply a judicial decision “retroactively.”¹²² Judge Newman found all the Supreme Court’s criteria against retroactivity satisfied: “*Dawco* overruled the precedent of the [COFC] on which West Coast relied; retrospective operation retards the purpose of facilitating review of contract disputes on their merits; and the result is ‘injustice or hardship’, for the right to appeal the merits is thereby lost.”¹²³

112. *Id.* at 316 (quoting parties’ stipulation).

113. *Id.* (quoting parties’ stipulation).

114. *Id.* at 314–15.

115. See 930 F.2d 872, 879–80 (Fed. Cir. 1991).

116. Judges Rader and Lourie.

117. *West Coast II*, 39 F.3d 312, 315 (Fed. Cir. 1994).

118. *Id.* (citations omitted).

119. *Id.*

120. *Id.* at 318 (Newman, J., dissenting).

121. *Id.* at 317.

122. *Id.* (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)).

123. *Id.*

Judge Newman considered it “untenable to require a party to litigate a procedural issue it has just lost in another claim on the same contract.”¹²⁴ She wrote:

In my view neither West Coast nor the Navy had the choice, much less the right, to ignore the decisions of the [COFC]. . . . However, the Navy changed its position after it was too late for West Coast to return to the invalid procedure. West Coast was fatally prejudiced by respecting the decision of the [COFC]. The Navy’s disrespect to that court is contrary to law, as well as unfair to those who do business with the government. It should not be ratified by the Federal Circuit.¹²⁵

G. 1996—Dalton v. Cessna Aircraft Co.

In this appeal, the contract specification stated: “These services shall consist of an annual rate of 17,000 airborne training service hours (approximately fifty-eight airborne training hours per graduated student).”¹²⁶ This provision resulted from a pre-contract history that began with a Navy RFI and pre-solicitation meetings. The RFI stated a range of 300–350 students and estimated flying hours of “12,000–17,000 hours per year.”¹²⁷ With respect to this wide range, the Navy Wing Commander explained to Cessna representatives that “current usage projected 12,000 flying hours, but that if Congress approved a battle group increase the [Navy] would use 17,000 hours.”¹²⁸ This current training syllabus was included in the Request for Quotation’s Statement of Work.¹²⁹ From this detailed curriculum “a bidder could deduce that [a graduated student] would receive up to 58.3 hours of training.”¹³⁰ The Navy represented that it “[did] not intend to modify the syllabus.”¹³¹

Based on the Cessna CEO’s testimony, the Wing Commander’s testimony, and pre-bid questions and answers, the ASBCA, in a split decision, decided that the 17,000 was not a definite quantity, but only a maximum constrained by the syllabus and “approximately 58 hours” per student, and available only if Congress approved a battle group increase.¹³² The Board also found that, after award, when it became clear that the battle-group contingency would not happen, the Navy sought “to utilize 17,000 hours with no additional students in the pipeline.”¹³³ Thus, to reach this target, the Navy imposed added requirements for passenger flights, rescue flights, overnight flights, and target flights not previously specified. In addition, the Navy modified

124. *Id.*

125. *Id.* at 315–16.

126. *Dalton v. Cessna Aircraft Co. (Cessna II)*, 98 F.3d 1298, 1300 (Fed. Cir. 1996), *reh’g & reh’g en banc denied* (1996).

127. *Id.*

128. *Id.* (alteration in original) (quoting *Cessna Aircraft Co. (Cessna I)*, ASBCA No. 48118, 95-1 B.C.A. (CCH) ¶ 27,560, at 137,346).

129. *Id.*

130. *Id.* at 1301.

131. *Id.* at 1300.

132. *Id.* at 1302–03 (citing *Cessna I*, 95-1 B.C.A. (CCH) ¶ 27,560, at 137,347).

133. *Id.* at 1303.

the training syllabus, increasing the approximately 58 hours to 78 training hours.¹³⁴ These actions precipitated Cessna's separate claims, all of which a majority of the ASBCA panel sustained, holding generally that the Navy had not simply bought 17,000 training hours, but rather that "the bidder's risk of having to supply 17,000 as opposed to 12,000 hours, or even less, was essentially dependent on an increase in the number of [students] the Navy would train. This possible increase, in turn, as no one disputes, depended on Congress approving additional battle groups."¹³⁵

The Federal Circuit majority¹³⁶ reversed the panel and agreed with the Government's argument that "the Navy contracted for an unqualified 17,000 [airborne service training hours] and that the reference to 58 hours per student was merely an estimate."¹³⁷ Without mention of the Board's findings of fact relating to pre-contract discussions of these provisions, the panel majority focused on three aspects of the contract's terms.¹³⁸ First, the panel thought that because it was a fixed-price contract, which was appropriate only "on the basis of reasonably definite . . . specifications" and did not "contain a method for varying the price in the event of unforeseen circumstances," such contracts "assign the risk to the contractor."¹³⁹ Second, "the 58-hour statement appeared in parenthesis [sic]" and was qualified by the word "approximately," "not clothed in the garb of a binding contractual provision."¹⁴⁰ Third, the court viewed "58 hours" as a "general provision" and 17,000 hours as a "specific" provision, giving precedence to the latter as a "provision directed to the particular matter" in question.¹⁴¹ Therefore, the Navy could reasonably take the position that "the 58-hour parenthetical" did not limit the Navy's rights.¹⁴²

However, the panel "assume[d] for the purpose of deciding this appeal" that Cessna's interpretation was reasonable, but, based on the language of the contract and the majority's interpretation of it, held as a matter of law that "this construction of the contract gave rise to a patent ambiguity."¹⁴³ The panel reached this conclusion without consideration of extrinsic evidence of intent or the ASBCA's findings of fact.¹⁴⁴ The majority found that "Cessna did not meet its obligation of inquiry."¹⁴⁵ Despite the Board's determinations, the

134. *Id.* at 1302.

135. *Cessna I*, ASBCA No. 48118, 95-1 B.C.A. (CCH) ¶ 27,560, at 137,352.

136. Judges Schall and Lourie.

137. *Cessna II*, 98 F.3d 1298, 1304 (Fed. Cir. 1996).

138. *Id.* at 1304-06.

139. *Id.* at 1304-05 (quoting FAR 16.202-2). This reasoning seemed flawed given the indefinite range of "12,000 to 17,000 hours" and the presence of the "Changes" clause.

140. *Id.* at 1305.

141. *Id.* (citing *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992)).

142. *Id.*

143. *Id.*

144. *See id.* at 1304-06.

145. *Id.* at 1306. By not considering extrinsic evidence to resolve an ambiguity in language, or to determine whether it is patent, the *Cessna* panel was consistent with other panel decisions.

panel could not find “a basis for concluding that the Navy shared Cessna’s construction of the contract.”¹⁴⁶

The majority’s decision was more than Judge Newman could accept, principally because of its disregard of the ASBCA’s findings of fact based on the extrinsic evidence of the parties’ intent:

The Board heard testimony to the effect that both the Navy and Cessna viewed the contract in the same way when it was bid, *i.e.*, that the 17,000 hours was a maximum figure to accommodate possible enlargement of the Wing, and not a blank check for flight activities beyond those explicitly provided. There was *no unresolved, patent ambiguity* at the time the contract was entered into.

The contract explicitly provided for “approximately 58 hours” of flight training per student. In evidence was the statement of the contracting officer that the Navy “does not intend to modify the syllabus.”¹⁴⁷

And further:

In view of the rules favoring the government that exist only in contracts with the government, to protect those who deal only with the government it is essential to distinguish between latent and patent ambiguity. The Board, on full hearing, with witnesses from both sides, determined that the 17,000 hours limit was understood that same way by both sides. No error has been shown in the Board’s findings on this point.¹⁴⁸

The *Cessna* decision thus presented Judge Newman with an intolerable combination of (1) a reflexive declaration of patent ambiguity, based on the panel’s own language-based interpretation without regard to the evidence of the parties’ negotiations and shared understandings, and (2) appellate disregard of and substitution for the trial forum’s specific findings of fact without reference to the statutory standards of review.¹⁴⁹ This mix of appellate interference, as she saw it, provoked her strong criticism from a policy standpoint:

The role of the courts is to assure fair and just resolution of contract disputes—not to bar access to Board or judicial review. The panel majority, in barring the contractor from the opportunity to challenge the government’s current interpretation, disserves the nation in its dependence on private contractors to meet governmental needs.¹⁵⁰

See, *e.g.*, *E.L. Hamm & Assocs. v. England*, 379 F.3d 1334, 1342 (Fed. Cir. 2004) (“If an ambiguity exists, the next question is whether that ambiguity is patent.” (quoting *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999))). However, in *Gardiner, Kamya & Associates, PC v. Jackson*, 467 F.3d 1348, 1352–53 (Fed. Cir. 2006), another panel rejected this next-step approach, citing en banc precedent, the Restatement (Second) of Contracts § 206, and prior Court of Claims precedent. There, the court characterized *contra proferentum* as a rule of “last resort.” *Id.* at 1352 (“[T]he doctrine of *contra proferentum* is applied only where other approaches of contract interpretation have failed.”).

146. *Cessna II*, 98 F.3d at 1306.

147. *Id.* at 1307 (Newman, J., dissenting) (emphasis added).

148. *Id.* at 1308.

149. See *id.* at 1307–08.

150. *Id.* at 1308 (citing *Winstar III*, 518 U.S. 839 (1996)).

H. 1997—Amertex Enterprises, Ltd. v. United States

In this unpublished decision, a panel majority¹⁵¹ upheld a COFC decision that Amertex Enterprises waived its “plausible and potentially convincing” cardinal change claim by accepting modifications extending the delivery schedule and revising the payment schedule to the date of deliveries.¹⁵² The modifications contained no waiver or release language.¹⁵³

The panel majority found an implied waiver, “since the modifications changed both parties’ obligations.”¹⁵⁴ The majority believed that the contractor “need[ed] to decide” between the modification and “cardinal change breach remedies” and that this was a “business choice,” freely made given the absence of pleading or proof of duress.¹⁵⁵ Therefore, the panel inferred:

Since Amertex agreed to the changes, it implicitly agreed that the changes were within the changes clause of the contract. There can only be a cardinal change if the government required Amertex to perform materially different duties from those bargained for in the contract *as modified*.¹⁵⁶

In sum, the majority concluded that “Amertex waived its cardinal change claim by entering into bilateral modifications.”¹⁵⁷

Judge Newman’s dissent is offered “respectfully,” but her impatience with “incorrect law” and inferences of waiver of the cardinal change claim is unmistakable: “There was no waiver or release of such a claim, at any time.”¹⁵⁸ The blunt labeling of “incorrect law” referred to errors of basic contract law.¹⁵⁹

First, the notion that Amertex’s decision to continue performing in the face of the breach waived a damage remedy for breach, not just the right to stop, was seen as a basic error. As she explained,

[a] business decision to continue to perform does not waive a contractor’s recourse to remedy on a theory of cardinal change. A material breach does not automatically and *ipso facto* end a contract. It merely gives the injured party the right to end the agreement; the injured party can choose between canceling the contract and continuing it.¹⁶⁰

The majority’s illogic that the early schedule modifications somehow transformed the cardinal change into a change under the contract was countered by application of this rule: “The contractor was not required to walk away from the contract instead of entering into the modified delivery and payment terms, in order to preserve a claim for cardinal change.”¹⁶¹ Thus, ab-

151. Judges Michel and Schall.

152. *Amertex Enters., Ltd. v. United States*, No. 96-5070, 1997 WL 73789, at *2 (Fed. Cir. Feb. 2, 1997), *reh’g denied*, 108 F.3d 1372 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

153. *Id.* at *4 (Newman, J., dissenting).

154. *Id.* at *2 (majority opinion).

155. *Id.* at *3.

156. *Id.* at *2 (emphasis added).

157. *Id.* at *1.

158. *Id.* at *4 (Newman, J., dissenting).

159. *Id.*

160. *Id.* at *5–6 (citations omitted).

161. *Id.* at *5.

sent a release or waiver, Amertex retained its damage claim for the cardinal change breach. Second, the panel's consideration of duress was "irrelevant": "the question of law is whether there was a waiver or release of this claim, and there plainly was not."¹⁶²

To underscore the contractor rights that were being forfeited, she recounted the substance and significance of that claim as found by the trial court:

The [COFC] made many findings relevant to the extent of the changes in the design specifications, and how these changes affected Amertex's performance. The court found as fact that the design was new and untested, that the specifications were inadequate or incorrect, and that the contract was not performable in accordance with its terms. The court concluded that "The fixed price contract became, in part, a research and development contract."

....

The unreasonable rejection of the second First Articles and the other unreasonable acts by the government which undermined this project hampered mass production and, arguably, fundamentally changed the nature of this contract.¹⁶³

Judge Newman summarized her opinion that the court was not holding the Government accountable for these extreme circumstances and was barring the contractor's compelling claim based on a tenuous and legally incorrect inference:

So substantive and financially significant a change in the contractor's rights can not be inferred from a contract modification that is silent on the matter of release of claims.¹⁶⁴

I. 1997—AT&T v. United States

In this case, AT&T sought monetary relief from a fixed-price contract for the development of submarine detection subsystems because the Navy failed to observe the requirements of section 8118 of the 1988 Department of Defense (DoD) Appropriations Act.¹⁶⁵ This legislation prohibited DoD agencies from obligating or expending funds for fixed-price development contracts for major weapons systems "unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties."¹⁶⁶ The Government failed to make this required risk determi-

162. *Id.* at *6.

163. *Id.* at *4–5.

164. *Id.*

165. *AT&T v. United States (AT&TI)*, 124 F.3d 1471, 1472–73 (Fed. Cir. 1997), *reb'g en banc granted & judgment vacated*, 136 F.3d 793 (Fed. Cir. 1998), *reb'g en banc*, 177 F.3d 1368 (Fed. Cir. 1999), *remanded to*, 48 Fed. Cl. 156 (2000), *aff'd*, 307 F.3d 1374 (Fed. Cir. 2002), *cert. denied*, 540 U.S. 937 (2003).

166. *Id.* at 1474 (quoting Department of Defense Appropriations Act of 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329–84 (1987)).

nation before awarding the contract to AT&T, which thereafter suffered a multimillion-dollar loss while completing performance.¹⁶⁷

AT&T relied on precedent that indicated two possible theories of recovery where a procuring agency acted illegally in awarding a contract.¹⁶⁸ First, AT&T sought reformation, contending that “the contract should be rewritten by the court to permit payment as a cost-based type contract, which is what Congress must have intended.”¹⁶⁹ Second, AT&T argued alternatively that the contract was “illegal and thus void,” entitling it to *quantum meruit* relief on the basis of an implied-in-fact contract.¹⁷⁰

AT&T’s claim thus put before the court a statute reflecting the long-standing policy issue about over-reaching risk allocation in DoD weapon systems contracts.¹⁷¹ In that context, AT&T’s claims raised the question: “What is the legal consequence” of the contracting agency’s statutory violation?¹⁷² AT&T’s alternative theories also introduced a complication that led to a series of COFC and Federal Circuit decisions, including two dissents by Judge Newman.

The COFC’s first decision ruled that the failure to make the required risk determination rendered the contract “void.”¹⁷³ On that basis, the court declined to grant reformation, reasoning that it could not reform a contract that did not exist.¹⁷⁴ The court concluded that it could award *quantum meruit* relief; however, before determining the extent of such relief, it certified the case for interlocutory appeal.¹⁷⁵

Both parties appealed, and AT&T continued to press its alternative theories.¹⁷⁶ The Government opposed them, arguing that the contract did not involve a major subsystem and thus was not covered by section 8118.¹⁷⁷ The Government also argued that the contract, even if contrary to the statute, was not void—perhaps having in mind the “large number of DoD contracts of a similar nature.”¹⁷⁸

The majority of the Federal Circuit panel¹⁷⁹ rejected the Government’s effort to rehabilitate the contract.¹⁸⁰ The panel recognized that there are different gradations of illegality, not all of which render a contract void, but rejected the Government’s arguments that section 8118’s funding limitation

167. *See id.* at 1473.

168. *Id.* at 1474, 1478.

169. *Id.* at 1474.

170. *Id.* at 1478–79.

171. *Id.* at 1478.

172. *Id.*

173. *Id.* at 1472 (citing *AT&T v. United States*, 32 Fed. Cl. 672, 682–83 (1995)).

174. *Id.* at 1479 (citing *AT&T*, 32 Fed. Cl. at 682).

175. *Id.*

176. *See id.* at 1474, 1478.

177. *Id.* at 1474.

178. *Id.* at 1472, 1478.

179. Judges Plager and Rader.

180. *AT&T I*, 124 F.3d at 1477–78.

did not curb “the very authority of the parties to enter into the contract.”¹⁸¹ In this connection, the panel agreed with the COFC that the statute “operates as a constraint on the contracting process intended for the protection of both Government and contractor.”¹⁸² Thus, the panel majority concluded that “[n]o valid contract was or could be entered into in the face of the express congressional prohibition.”¹⁸³

The panel decision noted that “AT&T agrees that the contract was void ab initio,”¹⁸⁴ but this conclusion did not help AT&T’s cause. Commenting that AT&T’s position was “internally inconsistent,” the panel affirmed the lower court’s conclusion that a contract that was “void ab initio” could not be reformed.¹⁸⁵

But what of AT&T’s *quantum meruit* alternative approved by the court below? The majority dashed this theory, by rejecting the COFC’s conclusion “that the consequence of its determination was to leave the parties with an implied-in-fact contract, with compensation to be awarded on a *quantum meruit* basis.”¹⁸⁶ Distinguishing (and disregarding) prior Federal Circuit decisions,¹⁸⁷ the panel stated:

The concept of implied-in-fact contract is not for the purpose of salvaging an otherwise invalid contract. An implied-in-fact contract arises when, in the absence of an express contract, the parties’ behavior leaves no doubt that what was intended was a contractual relationship permitted by law.

....

It is well established that the Court of Federal Claims does not have the power to grant remedies generally characterized as implied-in-law, that is, equity-based remedies, as distinct from those based on actual contractual relationships.¹⁸⁸

Thus, even though AT&T had performed the contract and delivered the systems, it had failed to state a claim because, as the majority baldly stated, “AT&T never had a contract with the Government.”¹⁸⁹

The panel majority did note that the Government possessed the goods and that “[t]here is nothing to suggest that AT&T intended to make a gift of that equipment to the Government, and much to suggest to the contrary.”¹⁹⁰ Apparently not considering whether these facts might provide a basis for find-

181. *Id.* at 1478.

182. *Id.*

183. *Id.*

184. *Id.* at 1479.

185. *See id.*

186. *Id.*

187. *Id.* (distinguishing *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986), which allowed recovery for value of goods delivered before rescission of the invalid contract, because it did not involve the “contracting authority”).

188. *Id.* The panel cited Chief Justice Rehnquist’s decision in *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), rejecting a claim of an implied-in-fact indemnification.

189. *AT&T I*, 124 F.3d 1471, 1479–80 (Fed. Cir. 1997).

190. *Id.* at 1480.

ing an implied-in-fact contract, the panel ended this remarkable opinion by suggesting that AT&T might “replevy the goods, or bring an appropriate action for the value of its wrongful retention and use by the Government”—an action “not before us.”¹⁹¹

There is a tone of disbelief in Judge Newman’s dissent, beginning with fact that “AT&T fully performed its contract obligations,” followed by this characterization as if it was sufficient to indict the decision: “The majority holds that because of the Navy’s transgression in complying with congressional oversight requirements, AT&T never had a contract with the Government.”¹⁹² And then with some indignation:

It is undisputed that both AT&T and the Navy performed this contract over a period of nearly five years. It cannot be correct for this court to charge AT&T with oversight responsibility for whether the Navy also carried out the internal assessment and approval that Congress and asked it to do. . . . AT&T bore no responsibility for the Navy’s compliance with these requirements, and indeed they could not know if the Navy had complied. It is inappropriate to assess AT&T with the consequences of the Navy’s internal lapses. . . . If the Navy did not fulfill its obligations to Congress, it does not follow that “AT&T never had a contract with the Government.”¹⁹³

Judge Newman then engaged in a review of the different gradations of contract illegality, for the obvious purpose of demonstrating that the contract was not a nullity—and to criticize “the dramatic penalty of voiding a fully performed contract.”¹⁹⁴ Her language, however, may have proved too much, such as when she stressed the “internal” nature of obligations to Congress and wrote, “Congress did not, however, prohibit the making of fixed price R&D contracts.”¹⁹⁵ Moreover, she relied on this statement in the legislative history of the later 1989 enactment of section 8118: “It is the intent of the committee that this section be applied in a manner that best serves the government’s interests in the long term health of the defense industry, and that this section not be used as the basis for litigating the propriety of an otherwise valid contract.”¹⁹⁶ Not only did this language undercut AT&T’s theory of recovery that the contract was void ab initio and replaced by an implied-in-fact contract (just as much as the majority opinion), it had the additional potential of undercutting any recovery.¹⁹⁷ This was not what Judge Newman had in mind.

However, Judge Newman’s dissent in the AT&T case succeeded when the court granted AT&T a rehearing en banc.¹⁹⁸ Surprisingly, the Government

191. *Id.*

192. *Id.* (Newman, J., dissenting).

193. *Id.* (citations omitted) (citing majority opinion).

194. *Id.* at 1480–81 (citations omitted).

195. *Id.* at 1481.

196. *Id.* (citing S. REP. NO. 100-326, at 105 (1988)). Arguably, this language did not apply to the 1988 provision, which governed the AT&T contract.

197. *Id.*

198. See generally *AT&T v. United States (AT&T II)*, 177 F.3d 1368 (Fed. Cir. 1999) (en banc), *aff’d*, 307 F.3d 1374 (Fed. Cir. 2002), *cert. denied*, 540 U.S. 937 (2002).

did not defend the majority's decision that the contract was void *ab initio* whereas AT&T continued to contend that it was.¹⁹⁹ In her decision on rehearing en banc Judge Newman focused on the certified questions—first, whether the contract was void, which she answered in the negative, and, second, what remedy is available on the premise of voidness, which was mooted by her answer to the first.²⁰⁰

Judge Newman was able to persuade only four of her colleagues to her rationale that the contract was not a nullity.²⁰¹ Moreover, she used the same double-edged reasons displayed in her dissent, including the 1989 legislative history quoted above.²⁰² That Judge Newman did not intend to so validate the Navy's award as to cut off any AT&T claim is indicated not only by subsequent events but also by the statements accompanying the remand to the COFC:

When a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void *ab initio*.

....

Although the parties discuss possible remedies, the issue of what relief may be available to AT&T is not before us, for the [COFC] did not consider AT&T's claims on the premise that the underlying contract was not void.²⁰³

That issue would be back before the court three years later.

J. 1999—Marathon Oil Co. v. United States

This case involved government oil and gas leases with Marathon and Mobil Oil for exploration and production authorized by the Outer Continental Shelf Lands Act (“OCSLA”).²⁰⁴ The leases subjected the exploration and production rights to requirements for statutory and regulatory approvals by both federal and state agencies, with the Federal Government having authority to override state objections.²⁰⁵ For these rights, Marathon and Mobil paid over \$156 million.²⁰⁶ Subsequent to execution of the contracts, Congress passed the Outer

199. *See id.* at 1373.

200. *Id.* at 1370, 1377.

201. Three judges concurred that the contract was not void on the ground that the submarine detection system was not covered by the statute. *Id.* at 1377. The author of the original opinion continued to conclude that the contract was a nullity and AT&T had “no rightful claim to another penny of public money.” *Id.* at 1383 (Plager, J., dissenting). Two judges did not participate. *Id.* at 1369 (majority opinion).

202. *Id.* at 1374–75 (majority opinion).

203. *Id.* at 1376–77.

204. *Marathon Oil Co. v. United States (Marathon Oil I)*, 158 F.3d 1253, 1255 (Fed. Cir. 1998), *opinion withdrawn & superseded on reh'g*, 177 F.3d 1331 (Fed. Cir. 1999), *rev'd sub nom.* *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000); *see* 43 U.S.C. §§ 1331–1343 (1970).

205. *Marathon Oil I*, 158 F.3d at 1255–56.

206. *Id.* at 1256.

Banks Protection Act (“OBPA”), which imposed a moratorium on exploration and prohibited approvals for over a year or until specified studies were completed.²⁰⁷ The companies demanded the return of the payments based on allegations that the Government had breached the contracts by not giving its approvals or exercising its override authority, by suspending the leases, and by imposing new requirements and policies based on the OBPA.²⁰⁸

The COFC held that the Government had materially breached by failing to carry out its contractual obligations.²⁰⁹ Relying on the Supreme Court’s then recent decision in *Winstar*, the court rejected sovereign act defenses based on its conclusion that the OBPA was targeted at the companies’ lease rights.²¹⁰ It held that the outer continental shelf (“OCS”) lease was not subject to subsequent statutes and related regulations, that the Government suspended the leases due to the OBPA, and that the Government had not considered or approved submissions in the timely and fair manner contemplated by the leases.²¹¹ Accordingly, the COFC ordered restitution of the payments made to obtain the repudiated rights.²¹²

The Federal Circuit panel majority²¹³ reversed, commenting critically that “[t]he trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences.”²¹⁴ The panel agreed that the OCS leases were not subject to the OBPA requirements or policies, but, in its view, “the outcome of the case does not turn on this issue.”²¹⁵ Instead, the panel noted that the lease rights were “expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.”²¹⁶ Marathon and Mobil thus could not establish that the failure to obtain the permit was caused by the OBPA moratorium rather than the lack of state concurrence.²¹⁷

This regulatory scheme specified that, if the secretary of interior approved a lessee’s plan of exploration (“POE”), “he may grant an exploratory license or permit if there is a state concurrence” under the Coastal Zone Management Act (“CZMA”).²¹⁸

207. *Id.* (citing Outer Banks Protection Act of 1990, Pub. L. No. 101-380, § 6003(c)(3)(A), 104 Stat. 484 (1990)).

208. *Id.* at 1256–57.

209. *Id.* at 1257 (citing *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996)).

210. *Id.* at 1257–58 (citing *Winstar II*, 64 F.3d 1531 (Fed. Cir. 1995), *aff’d*, 518 U.S. 839 (1996)).

211. *Id.*

212. *Id.* at 1258; see *Conoco Inc.*, 35 Fed. Cl. at 331.

213. Judges Plager and Rader.

214. *Marathon Oil Co. v. United States (Marathon Oil II)*, 177 F.3d 1331, 1338 (Fed. Cir. 1999).

215. *Id.* at 1337.

216. *Id.*

217. *Id.* at 1338.

218. *Id.* at 1337–38 (citing 43 U.S.C. § 1340(c)(2) (1994)).

The majority's decision rested on the objections registered and maintained by North Carolina "throughout the time that the moratorium imposed by the OBPA was effective. Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence or the override provided by law."²¹⁹

After the moratorium, the secretary of commerce had rejected the request for override.²²⁰ The panel, noting the arguments that his decision was based "in large part on the OBPA and the findings of the OBPA Panel," commented that the "real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections."²²¹ The panel decision disposed of these arguments by stating that "this issue is not before us on appeal so we do not address it further."²²² The majority summarized its decision: "This is not a case of a supervening act that makes performance impossible, but simply a playing out of the express provisions of the agreement."²²³

Judge Newman's dissent came right to the point of disagreement: "It was not a 'failure to obtain the required permits' through fault of Marathon that barred exploration . . . it was the change of government policy after the exploration rights had been sold and paid for . . . [and] Marathon just wants its money back."²²⁴ Under "simple contract principles," it should be returned—as Judge Newman noted, "My colleagues now authorize the government to keep it. That is not the law, and it is not responsible government dealing."²²⁵

Her dissent acknowledged but took a different view of the role of North Carolina in "eliminat[ing] Marathon's exploration right":²²⁶

While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by enactment of the [OBPA], and then by the refusal of the Secretary of Commerce to override the state's objection, this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.²²⁷

219. *Id.* at 1338.

220. *Id.* at 1335.

221. *Id.* at 1339.

222. *Id.* The decision similarly disposed of Marathon's argument that the Outer Continental Shelf Lands Act of 1953 ("OSCLA") provided for compensation in the event of cancellation. *See id.*, acknowledging that sections of "OSCLA [do] give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. Those sections are not applicable to the case before us, and Marathon does not claim that they are." *Id.* (citations omitted).

223. *Id.* at 1340. The opinion noted that "[t]he Supreme Court has recognized that only major oil companies can 'risk paying a large [up-front] cash bonus to lease a tract of unknown value.'" *Id.* at 1340–41 (second alteration in original) (quoting *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154 (1981)).

224. *Id.* (Newman, J., dissenting). Judge Newman, for convenience, referred to both contractors as "Marathon." *Id.* at 1340 n.2.

225. *Id.* at 1341.

226. *Id.*

227. *Id.* Judge Newman also pointed out that "the exploration of the outer continental shelf was and is within the control of the federal government." *Id.*

Judge Newman emphasized that, while the OCSLA set time limits for consideration of the lessees' submissions, the OBPA "precluded action on Marathon's exploration plan during the OCSLA time frame."²²⁸ The events subsequent to the execution of the leases were "all outside of the control of Marathon" and within the control of the Government.²²⁹

Citing "hornbook law" and the Restatement (Second) of Contracts ("Restatement"), Judge Newman reported that restitution is an appropriate remedy when a contract becomes impossible of performance through causes outside the control of a party.²³⁰ In sum, while Marathon had the risk that exploration might be unsuccessful, it did not assume the risk that exploration would be barred, "especially by the same party from whom it bought the right."²³¹

The Supreme Court agreed with Judge Newman. Although Justice Breyer's opinion noted that the lessees must have been aware that obtaining the necessary permission under OCSLA "might not be an easy matter,"²³² the leases allowed the Government to condition approvals only on existing statutes and regulations:

These provisions mean that the contracts are not subject to future regulations promulgated under other statutes, such as a new statute like OBPA. Without some such contractual provision limiting the Government's power to impose new and different requirements, the companies would have spent \$156 million to buy next to nothing.²³³

Yet that is what they got because the Court found that "OBPA required Interior to impose the contract-violating delay."²³⁴ Further, OBPA created new requirements, in the form of new analyses before any approvals could be given.²³⁵

The Court seems to have been particularly impressed by the Department of Interior's communication to North Carolina that Mobil Oil's POE was "deemed approvable in all respects" and "fully complies with the law and will have only a negligible effect on the environment."²³⁶ On this basis, the Federal Government advised North Carolina that it was "not authorized to disapprove" it, but, significantly, added that OBPA "prohibits the approval of

228. *Id.*

229. *Id.* at 1342.

230. *Id.* (citing 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1112, at 549 (1964); RESTATEMENT (SECOND) OF CONTRACTS §§ 272, 264, 377 (1981)). Judge Newman also pointed out that OCSLA provides that "when environmental harm or other causes of disapproval can not be avoided by exploration, the Secretary may cancel the lease, but, on such event the lessee shall be entitled to compensation." *Id.* Even though the North Carolina objections relied on by the majority were environmental, the Government had not canceled the lease, just rendering exploration impossible, even though the plans were "approvable in all respects." *Id.*

231. *Id.* at 1343.

232. Mobil Oil Exploration & Producing Se., Inc. v. United States, 530 U.S. 604, 609 (2000).

233. *Id.* at 616.

234. *Id.* at 605.

235. *Id.*

236. *Id.* at 612.

any Exploration Plan at this time.”²³⁷ This alone “substantially impair[ed] the value of the contract[s].”²³⁸

Under these circumstances, restitution was the appropriate remedy, as indicated by the Restatement.²³⁹ Responding to the Government’s argument that approvals might not have been given under OCSLA or that the exploration might not have been fruitful, the opinion observed that the companies were not seeking damages for breach, but only restitution of the initial lease payments.²⁴⁰ Mobil and Marathon were entitled to restitution “whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore.”²⁴¹

Justice Breyer introduced his discussion of restitution and the Restatement, with the now familiar language from the *Winstar* decision: “When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private parties.”²⁴² Thus the Court applied “basic contract law principles.”²⁴³

K. 2002—AT&T v. United States

When the *AT&T* case returned to the Federal Circuit, to Judge Newman’s surprise the COFC on remand had dismissed AT&T’s complaint for failure to state a claim upon which relief could be granted, holding that “non-compliance” with section 8118 was “not an actionable wrong.”²⁴⁴ A panel majority²⁴⁵ upheld the dismissal.²⁴⁶

To Judge Newman’s obvious irritation, the panel majority relied heavily on her en banc opinion to reach this result:

As already noted, this court held en banc that section 8118 does not “terminate fully performed contracts because of [DoD’s] flawed compliance.” For that reason, the en banc court held that the Navy’s “noncompliance with the supervisory and reporting instructions” in section 8118 did not render the [reduced diameter array] contract void. Instead, this court emphasized the “supervisory” role of the legislative branch in ensuring compliance with the policies of section 8118. More specifically . . . this court held that section 8118 functions as an “internal review and reporting procedure[]” for congressional oversight.²⁴⁷

237. *Id.*

238. *Id.* at 624 (alteration in original) (citing RESTATEMENT (SECOND) OF CONTRACTS § 243 (1981)).

239. *Id.* at 608 (citing RESTATEMENT (SECOND) OF CONTRACTS § 373).

240. *Id.* at 623–24.

241. *Id.* at 624. At this point, the Court analogized the Government to a lottery operator who fails to deliver a purchased ticket: “the purchaser can get his money back—whether or not he would have won the lottery.” *Id.*

242. *Id.* at 607–08 (citing *Winstar III*, 518 U.S. 839, 895 (1996)).

243. *Id.* at 607.

244. *AT&T v. United States (AT&T III)*, 307 F.3d 1374 (Fed. Cir. 2002) (citing *AT&T v. United States*, 48 Fed. Cl. 156, 160 (2000)), *reh’g en banc denied* (2003).

245. Judges Rader and Prost.

246. *AT&T III*, 307 F.3d at 1376.

247. *Id.* at 1378 (first and third alterations in original) (citing *AT&T II*, 177 F.3d 1331, 1374–76 (Fed. Cir. 1999)).

The majority then cited the Senate committee's report that noncompliance with section 8118 should not be "the basis for litigating the propriety of an otherwise valid contract," noting that "[t]his court en banc gave significant weight to this statement of one Senate committee."²⁴⁸ For the majority, this all added up to more than her conclusion that the contract was not void ab initio; it also supported the COFC's refusal to entertain AT&T's request for reformation because "Section 8118 simply does not provide implicitly or explicitly for any enforcement of its supervisory and congressional oversight provisions in a judicial forum."²⁴⁹

To this dispositive conclusion, the majority added some appellate fact finding to support the further conclusion that "AT&T waived its present arguments even [if] those arguments [were] to state a valid claim."²⁵⁰ These findings included that AT&T, "a sophisticated player," did not seek a cost-reimbursement contract during contract negotiations, successfully underbid technically superior contractors, defended against a competitor's protest action, assumed the risk of its lower technical rating, and avoided more intrusive government supervision that comes with a cost-reimbursement contract.²⁵¹ The panel thus "perceived" that competition on a cost-reimbursement basis "may have taken AT&T out of the game."²⁵²

Judge Newman dissented that neither the COFC nor the majority had reached "the issue of the remand," which was "the question of relief, on the premise that the contract, though flawed, was not void ab initio."²⁵³ She quoted her en banc decision's concept of the remand issue:

When a contract or a provision thereof is in violation of law but has been fully performed, the courts have variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void ab initio.²⁵⁴

In her view the COFC erroneously held that

since Section 8118 was not "enforceable" by AT&T, AT&T had no claim based on the admitted violation of Section 8118 by the government; the court declined to consider any other ground presented by AT&T, including "reformation, implied contract recovery, rescission and restitution" and did not explain its conclusion that none of these grounds could apply.²⁵⁵

Behind this criticism lay this:

As a fundamental premise of governmental procurement, it is presumed that the Navy believed that this submarine surveillance system could be developed and pro-

248. *Id.* (citing S. REP. NO. 100-326, at 105 (1988)).

249. *Id.* at 1379.

250. *Id.* at 1380.

251. *Id.* at 1380-81.

252. *Id.* The panel did not find that AT&T knew of the Navy's failure to comply with section 8118. *Id.*

253. *Id.* at 1382-83 (Newman, J., dissenting).

254. *Id.* (citing *AT&T II*, 177 F.3d 1368, 1376 (Fed. Cir. 1999)).

255. *Id.* at 1383 (citations omitted).

duced at the contract price. Indeed, if the Navy entered a contract that it knew could not be performed at the contract price, then the procurement was fatally tainted.²⁵⁶

Judge Newman believed these issues were fairly raised by “[t]he record before us [which] shows only that the contractor completely and successfully performed a contract for which the technologic complexities, and the ensuing cost of technologic solutions, were seriously underestimated.”²⁵⁷

As to the majority’s waiver findings, including the “pejorative verdict” that AT&T’s technical capability was “inferior” and its bid deliberately “too low,” she rejected them as “outside the record” and “speculative theories,” inappropriate for resolution on appeal, particularly on appeal from a dismissal for failure to state a claim.²⁵⁸ Still seeking the remand she thought was required by the en banc decision, she summarized:

The briefs raise factual and legal questions, and equitable aspects, the weight and value of which have never been aired, and on which evidence has never been adduced. I do not know whether this contract warrants relief. But it is incorrect to hold that the facts are irrelevant and that there can be no relief unless Section 8118 is enforceable by AT&T. *AT&T has not yet had its day in court.*²⁵⁹

L. 2002—Johnson Management Group CFC v. Martinez

Johnson Management also presented an issue of an illegal contract provision.²⁶⁰ In contrast to *AT&T*, in this case the Government sought to avoid and the contractor sought to enforce. Notwithstanding this reversal of positions, the Government again prevailed.²⁶¹

The dispute centered on a specially negotiated provision of a tripartite agreement between U.S. Department of Housing and Urban Development (HUD), the Small Business Administration (SBA), and a “socially and economically disadvantaged small business concern.”²⁶² The special clause set forth this explicit agreement about liquidation of advance payments: “The payments advanced under this contract will be considered liquidated upon submission of invoices marked as paid by the suppliers. Invoices shall be for the items listed in the Use of Advance Payments clause.”²⁶³

This special clause was “negotiated for HUD by an experienced [CO] and reviewed by HUD supervisory authority and legal counsel, with full participation of the SBA.”²⁶⁴ Johnson Management alleged, without contradiction

256. *Id.* at 1382–83.

257. *Id.* at 1382.

258. *Id.* at 1382–83.

259. *Id.* at 1383 (emphasis added). It is not clear what theory Judge Newman had in mind, although it is possible that section 8118 might be seen as shifting to or sharing with the Government the risk of commercial impracticability in form of the “technologic complexities,” without attacking the validity of the contract.

260. Johnson Mgmt. Grp. CFC, Inc. v. Martinez, 308 F.3d 1245, 1257 (Fed. Cir. 2002).

261. *Id.* at 1248.

262. *Id.* at 1247 & n.1.

263. *Id.* at 1259 (Newman, J., dissenting).

264. *Id.* at 1259–60.

according to Judge Newman's dissent, that the advance payments were "part of the overall compensation" in exchange for a lower price.²⁶⁵ In accordance with this liquidation agreement, Johnson Management used the advance payments to purchase approved equipment and submitted the "invoices marked as paid by the suppliers."²⁶⁶ When, for unrelated reasons, HUD terminated the contractor for default, HUD claimed a lien on the equipment or repayment of the advance payments; Johnson Management rejected these claims on the basis that the advances had already been "liquidated" in accordance with the special provision, as they indisputably had been.²⁶⁷

The panel majority²⁶⁸ ruled that the special liquidation provision was "squarely contrary to the FAR's Advance Payments clause."²⁶⁹ The FAR required that "the Contractor repay to the Government any part of unliquidated advance payments" and further that, upon termination, "the Government shall deduct from the amount due to the Contractor all unliquidated advance payments."²⁷⁰ The FAR did not define "liquidated" or "unliquidated," so the panel majority turned to a dictionary reference:

The concept of liquidation in the context of advance payments is relatively straightforward. The term "liquidate" is defined in Black's Law Dictionary as "to settle (an obligation) by payment or other adjustment." In order to "liquidate" an advance payment balance, a contractor must do either of two things: (1) repay the advance payments, or (2) perform contract work and then have the government apply to the outstanding balance of the advance payments the amount that otherwise would be paid to the contractor for work.²⁷¹

Based on its interpretation, the majority concluded that "the [CO] was not authorized to liquidate [Johnson Management's] advance payments in the manner" to which she agreed.²⁷² The special liquidation clause was contrary to the regulations and therefore "without force and effect."²⁷³

The range of Judge Newman's disagreement is captured in this sentence from the dissent: "If the provision is in fact illegal—a matter open to substantial question—it cannot simply be deleted by one of the parties, thereby imposing a major liability on the contractor. . . ."²⁷⁴ Assessing the contractor with the full consequences of "government error," "thereby significantly changing the bargain," she wrote, "is as unjust as it is unsupportable in the law of government contracting."²⁷⁵

On the question of illegality, her dissent chides the majority for inaccurately couching the issue as "whether Johnson [was] required to return un-

265. *Id.* at 1260.

266. *Id.* at 1259.

267. *Id.* at 1255 (majority opinion).

268. Judges Schall and Rader.

269. Johnson Mgmt. Grp. CFC, Inc. v. Martinez, 308 F.3d 1245, 1256 (Fed. Cir. 2002).

270. *Id.* at 1254 (quoting FAR 52.232-12 (1984)).

271. *Id.* at 1253 (citing BLACK'S LAW DICTIONARY 941 (7th ed. 1999)).

272. *Id.* at 1256.

273. *Id.* at 1255.

274. *Id.* at 1259 (Newman, J., dissenting).

275. *Id.*

liquidated advance payments,” an undisputed point, instead of whether there was an obligation to “repay the advance payments that were fully liquidated in accordance with the liquidation details in the contract.”²⁷⁶ Judge Newman pointed out that the dictionary definition relied on by the majority did “not appear in the contract.”²⁷⁷

Judge Newman also noted that “it is incorrect that an agency cannot adjust the provisions of the FAR to particular circumstances, or that no departure is ever permitted.”²⁷⁸ The FAR permits deviations—and, more readily, one-time deviations.²⁷⁹ On this point, Judge Newman wrote:

The panel majority, acknowledging that [COs] may deviate from the FAR, faults Johnson for failing to prove that this contracting officer did not act without authorization. That burden is not on Johnson, for *prima facie* the agency’s official action was authorized. Further, it is not disputed that all necessary approvals were obtained by both HUD and the [SBA].²⁸⁰

By invoking the presumption of regularity often relied on by the Government and the Federal Circuit, Judge Newman exposed the presumption’s tension with placing the burden of ascertaining and proving authorization on the contractor.

But Judge Newman’s dissent is primarily concerned with the judicial consequence of an illegal clause—or what the court should do about it. In her view, the burden of government error should not fall solely on the contractor.²⁸¹ The dissent reviews Federal Circuit precedent providing “guidance with respect to government error” and illustrating “remedies that do not impeach the integrity of contracts.”²⁸² These precedents provided “remedy appropriate to the circumstances” in the form of reformation, estoppel, enforcement, and *quantum meruit* when the CO’s action was illegal or unauthorized, “based on ordinary principles of equity and justice.”²⁸³ “In none of these cases,” Judge Newman observed, “was the offending provision simply expunged, changing the balance of the contract.”²⁸⁴

With respect to estoppel, the dissent distinguished *OPM v. Richmond*, and noted that the Supreme Court stated: “[W]e need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim should ever succeed against the Government.”²⁸⁵ Judge Newman pointed out that, in *Burnside-Ott*

276. *Id.*

277. *Id.* at 1262 n.1.

278. *Id.* at 1262 (citing FAR 1.402 (1984)).

279. *Id.* at 1256 n.2 (majority opinion) (citing FAR 1.402).

280. *Id.* at 1262 (Newman, J., dissenting).

281. *Id.* at 1259.

282. *Id.* at 1260–61 (citing *New England Tank Indus. of N.H., Inc. v. United States*, 861 F.2d 685, 686 (Fed. Cir. 1988) (CO violated FAR); *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1186 (Fed. Cir. 1988) (reformation where contract term in violation); *USA Petroleum Corp. v. United States*, 821 F.2d 622, 622 (Fed. Cir. 1987) (estoppel)).

283. *Id.*

284. *Id.* at 1261 (citing *Prestex Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963)).

285. *Id.* (quoting *OPM v. Richmond*, 496 U.S. 414, 423 (1990)). Judge Newman did not include the Court’s statements denying estoppel in that case, but argued that it involved “erroneous advice,” not an approved contract agreement. *Id.*

Aviation Training Center, Inc. v. United States, the Federal Circuit limited the *Richmond* decision to claims contrary to a statutory appropriation.²⁸⁶

Judge Newman swiftly distinguished the off-cited landmark case of *Federal Crop Insurance Corp. v. Merrill* as simply “a matter of incorrect advice by an ill-informed clerk.”²⁸⁷ In contrast, she wrote, “[t]his is a formal government contract, negotiated by experienced [COs], fully approved and executed by authorized officials.”²⁸⁸ This distinction had arguable support in precedent²⁸⁹ but was breathtakingly dismissive of a longstanding, seemingly seminal Supreme Court decision. Perhaps in recognition, Judge Newman applied a competing principle, also longstanding, but recently reinforced by the Supreme Court in cases familiar to her:

When the government enters into commerce it is bound by the rules of commerce. The government proposes on this appeal that although the contract provision was a mistake on its part, the government does not bear the consequences of its mistake. However, *the laws of contract and the rules of fair dealing do not evaporate when the government is a party*. When a contract provision becomes illegal, whether due to later-discovered error or statutory enactment, the party that produced the illegality is liable for the injury caused thereby.²⁹⁰

Judge Newman concluded with a theme that recurs in her dissents: “The panel majority’s cavalier treatment of the integrity of government contracts disserves the government as well as those who undertake to serve it.”²⁹¹

M. 2002—Pacrim Pizza Co. v. Pirie

In this appeal, the panel disagreed about the extent of CDA jurisdiction over nonappropriated fund instrumentalities (“NAFIs”).²⁹² Pacrim Pizza sought review of a default termination of its contract for pizza deliveries, let by a Marine Corps’ Morale, Welfare, and Recreation (“MWR”) activity at a base in Japan.²⁹³ The panel’s disagreement centered on (a) the statutory interpretation and prior precedents and (b) the effect of contract language promising review under the CDA.²⁹⁴

286. *Id.* at 1262 (citing *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581–82 (Fed. Cir. 1993)).

287. *Id.* at 1261 (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)).

288. *Id.* at 1261–62.

289. *See, e.g.*, *Am. Elec. Labs., Inc. v. United States*, 774 F.2d 1110, 1116 (Fed. Cir. 1985) (estopping reliance on limitation of funds clause); *Broad Ave. Laundry & Tailoring v. United States*, 681 F.2d 746, 749 (Ct. Cl. 1982) (estopping Government regarding applicable wage rates); *Litton Sys. Inc. v. United States*, 449 F.2d 392, 401 (Ct. Cl. 1971) (holding that contractor was entitled to notice that Government would no longer approve previously approved accounting).

290. *Johnson Mgmt. Grp. CFC, Inc. v. Martinez*, 308 F.3d 1245, 1261 (Fed. Cir. 2002) (emphasis added) (citing *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) (“When the United States enters into contract relations, its right and duties therein are governed generally by the law applicable to contracts between private individuals.”); *Winstar III*, 518 U.S. 839, 910 (1996)).

291. *Id.* at 1262.

292. *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1293 (Fed. Cir. 2002).

293. *Id.* at 1292.

294. *Id.* at 1293–94.

Judge Newman was on a panel with judges who had joined in one of the earlier precedents denying jurisdiction.²⁹⁵ As they explained in the *Pacrim Pizza* majority opinion: “The [CDA], in relevant part, applies to ‘any express or implied contract (including those of the nonappropriated fund activities described in Section[s] 1346 and 1491 of Title 28). . . .’”²⁹⁶

The Tucker Act identified “the Army and Air Force Exchange Service, the Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.”²⁹⁷ Thus, the majority wrote: “Contracts with NAFIs outside these enumerated exchanges are not covered by the [CDA].”²⁹⁸

Relying on the “plain language” of the statutes, the panel majority concluded that “the non-appropriated funds doctrine” barred jurisdiction.²⁹⁹ The Marine Corps MWR, though performing exchange type functions, did not pass the statutory test because it was “not denominated a major exchange.”³⁰⁰

The majority recognized that *McDonald’s Corp. v. United States* “holds that there are exceptions to this narrow construction.”³⁰¹ The majority described the holding in this way:

A NAFI may be a covered contracting entity under the [CDA] if it is closely affiliated with a post exchange and meets a three-part test: it must have sufficient assets to reimburse the United States the cost of a judgment, be clearly defined as within the resale system, and provide financial data sufficient to predict the government’s potential liability.³⁰²

However, the majority ruled that the Marine Corps MWR did not meet “the threshold requirement” of close affiliation with a post exchange—and “the three-part test does not come into play.”³⁰³

Judge Newman accepted none of this. Her interpretation was quite different from her colleagues’ view. She wrote:

The relevant statutes are the [CDA] and the statutes that hold that the military and NASA Exchanges shall be treated like other United States agencies but shall reimburse the government for their judgments. The statutes do not thereby also provide that every contract with every other self-sustaining governmental activity is immune from judicial review.

....

295. Chief Judge Mayer and Judge Bryson, who also joined in *Furash & Co. v. United States*, 252 F.3d 1336, 1344 (Fed. Cir. 2001).

296. *Pacrim Pizza*, 304 F.3d at 1292.

297. *Id.* at 1292–93 (quoting 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2000)).

298. *Id.* at 1293 (“The parenthetical language . . . describes the military exchanges as ‘the non-appropriated fund activities described in [the Tucker Act],’ which implies that other non-appropriated fund activities are not included.” (citing *Furash*, 252 F.3d at 1343)).

299. *Id.* at 1292.

300. *Id.* at 1293.

301. *Id.* (citing *McDonald’s Corp. v. United States*, 926 F.2d 1126, 1133 (Fed. Cir. 1991)).

302. *Id.* (citing *McDonald’s*, 926 F.2d at 1132–33).

303. *Id.*

These provisions do not remove contracts with other United States non-appropriated fund entities from the Contract Disputes Act; they simply say that Exchange contracts are considered contracts with the United States. Other statutory provisions do not exclude all other [NAFIs] from the [CDA]; the statute-based difference is in who pays the judgment, not in whether there is judicial review.³⁰⁴

Further, she could not find any “exclusion from the [CDA] of all contracts with [NAFIs] other than the exchanges.”³⁰⁵ “It strains belief” that the statutory cross-reference was “intended to legislatively bar review of all such breaches.”³⁰⁶

Judge Newman also dissented from the majority’s reading of *McDonald’s*.³⁰⁷ She read *McDonald’s* as rejecting a narrow construction, by establishing the three-part test: “Under the three-part test, we must conclude that a NAFI which lacks sufficient assets, is not clearly defined as being within the resale system, or over which the Government could not obtain financial data, would not be included in the statutory waiver.”³⁰⁸ Thus, Judge Newman concluded, “*McDonald’s* did not hold that the NAFI must be ‘closely affiliated’ with an Exchange; the court held that an activity with sufficient assets, clearly defined, and financially accountable, is subject to the [CDA].”³⁰⁹ The Marine Corps MWR met the *McDonald’s* test.³¹⁰

Moreover, the Government’s contract promises struck Judge Newman’s fairness nerve.³¹¹ The MWR contract contained the standard form “Disputes” article, promising Pacrim Pizza the right to review at the ASBCA and, further, appeal to the Federal Circuit.³¹² The contract also explained MWR’s “Legal Status” in a way that seemed to Judge Newman to recognize “that suits may be brought under the [CDA].”³¹³ The contract stated that “MWR contracts are United States contracts; however, they do not obligate appropriated funds of the United States except for a judgment or compromise settlement in suits brought under provisions of [the CDA], in which event the Marine Corps MWR will reimburse the United States Government.”³¹⁴

This contract language seemed consistent with Judge Newman’s statutory interpretation, but the majority explained that the language merely discussed payment of judgments “if the [CDA] does apply,” dismissing the clause as “not operative” because “the [CDA] does not apply.”³¹⁵ The Government, not surprisingly, asserted that the “Disputes” clause was inserted in error, and the

304. *Id.* (Newman, J., dissenting).

305. *Id.* at 1297.

306. *Id.* at 1297–98.

307. *Id.* at 1298.

308. *Id.* (quoting *McDonald’s Corp. v. United States*, 926 F.2d 1126, 1132 (Fed. Cir. 1991)).

309. *Id.*

310. *Id.*

311. *Id.* at 1299.

312. *Id.* at 1295.

313. *Id.*

314. *Id.* (citing 31 U.S.C. § 1304(c) (2000)).

315. *Id.* at 1294 (majority opinion).

majority commented: “We recognize the awkwardness of the government’s position, but only Congress can grant waivers of sovereign immunity. . . .”³¹⁶

Judge Newman responded vehemently to the court’s failure to hold the Government to its promise:

The court’s . . . ruling diverges from precedent as well as from statute, and exacerbates the unfairness of the practice here illustrated. . . . It is a *travesty of fair dealing* for our government to issue contracts that state that remedy is available under the [CDA], but when a dispute arises to hold that the Disputes clause was included by government error, and that the promised judicial review is not available.³¹⁷

N. 2002—Schism v. United States

In this extraordinary case, the en banc Federal Circuit split nine to four over whether the Government was bound by promises of lifetime free medical care that its military recruiters, upon direction of superiors, made to induce individuals to join the armed services and serve for twenty years.³¹⁸ The Government conceded that the promises were made and relied upon in good faith, but insisted that they were not enforceable.³¹⁹ The court’s majority, per Judge Michel, ruled that the Government did not commit a contract breach when it restricted military retirees, who had performed their twenty-year part of the bargain, to care under Medicare.³²⁰

Judge Newman joined in a dissenting opinion written by Chief Judge Mayer.³²¹ The dissent was joined by Judge Gajarsa and Judge Plager, who also wrote a separate opinion.³²² Judging by the emotional tone of the dissents, it may be surmised that Judge Newman found company among the dissenters based on a sense of special obligation to servicemen.³²³

The court’s majority, in a long opinion that can only be summarized here, ruled that the Government was not bound because the recruiters’ promises were made without authority—and thus there was no implied-in-fact contract.³²⁴ This conclusion was grounded first on precedents indicating that military pay and benefits were statutory matters, exclusively controlled by Congress and not properly governed by contract or contract law.³²⁵ The majority distinguished decisions enforcing other contract promises made to military recruits

316. *Id.*

317. *Id.* at 1299 (Newman, J., dissenting) (emphasis added).

318. *Schism v. United States (Schism II)*, 316 F.3d 1259 (Fed. Cir. 2002) (en banc), *cert. denied*, 539 U.S. 910 (2003).

319. *Id.* at 1262.

320. *Id.* at 1264.

321. *Id.* at 1301 (Mayer, J., dissenting).

322. *Id.* at 1311–12 (Plager, J., dissenting). Previously, Judges Mayer, Newman, and Gajarsa had issued a panel decision in favor of the retired servicemen. *See Schism v. United States (Schism I)*, 239 F.3d 1280, 1291 (Fed. Cir. 2001), *reh’g granted & opinion withdrawn*, 252 F.3d 1354 (Fed. Cir. 2001).

323. *See Schism II*, 316 F.3d at 1301–12 (Mayer & Plager, JJ., dissenting).

324. *Id.* at 1264.

325. *Id.* (citing *Bell v. United States*, 366 U.S. 393, 401 (1961); *Lynch v. United States*, 292 U.S. 571, 577 (1934)).

because those cases did not involve military compensation or “gratuities,” as the court put it.³²⁶ *Lynch v. United States*, the majority explained, involved war risk insurance, not an enlistment contract that “changes in status . . . [as] [soldier’s] relations to the State and the public are changed.”³²⁷ The majority also held that, even if a contract analysis were appropriate, the recruiters lacked actual authority.³²⁸ Thus, the claims were blocked by *Federal Crop Insurance Corp. v. Merrill*, cited for the proposition that the retirees “assume[d] the risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority.”³²⁹

While the earlier panel decision had recognized authority of the military services under 5 U.S.C. § 301 to run their departments and thus to recruit, the en banc majority dismissed it as a mere “housekeeping statute,” based on the Supreme Court’s decision in *Chrysler Corp. v. Brown*:

But a housekeeping statute that authorizes rules of agency organization, procedure, or practice and not substantive rules cannot confer a right to, or otherwise authorize the promise of a right or entitlement to free lifetime medical care.³³⁰

Section 301’s admitted standing as authority for plans that provided health care on “a space available basis” did not persuade the majority that such secretarial authority extended to free lifetime health care.³³¹ The majority “consider[ed] sympathetically the veterans’ position that, because § 301 authorizes one type of health care, it necessarily authorize[d] another,” but saw a “distinct” difference between a conditional grant and a permanent, more discretionary right.³³²

Furthermore, the majority added, interpreting section 301 as authorizing the recruiters’ promises “would be unreasonable” in light of the Anti-Deficiency Act (“ADA”), which “placed preconditions on obligating or spending appropriated funds.”³³³ Thus the majority concluded that the recruiters “lacked actual authority, meaning the parties never formed a valid, binding contract,” citing *OPM v. Richmond*, for the proposition that erroneous advice “did not create an estoppel when finding to the contrary would violate the principle ‘that payments of money from the Federal Treasury are limited to those authorized by statute.’”³³⁴ “In any event,” the court added, “the Secretary’s authority to conduct recruiting does not carry with it the broad authority to make promises that bind future Congresses to appropriate

326. *Id.* at 1272–73, 1275–76.

327. *Id.* at 1273 (second alteration in original) (quoting *Bell*, 366 U.S. at 402).

328. *Id.* at 1276–77.

329. *Id.* at 1278 (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)).

330. *Id.* at 1281 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1999) (holding that section 301 did not authorize disclosure of contractor trade secrets protected under 18 U.S.C. § 1905 (1994))).

331. *Id.* at 1281–82, 1284–85.

332. *Id.* at 1282.

333. *Id.* at 1283 (citing 5 U.S.C. § 70 (2000)).

334. *Id.* at 1284 (citing *OPM v. Richmond*, 496 U.S. 414, 416–17 (1990)).

funding for free lifetime care.”³³⁵ The majority concluded by acknowledging that the retired officers were “sympathetic plaintiffs,” but insisted that “Federal judges have a duty to uphold the Constitution and laws, even if that means making unpleasant or unpopular decisions.”³³⁶

Chief Judge Mayer’s dissent began with an emotional introduction, which exclaimed:

Of course, Congress knew; of course the service secretaries authorized promises in return for service; of course these military officers served until retirement in reliance; and of course there is a moral obligation to these men: it is called honoring the contract the United States made with them and which they performed in full.³³⁷

Then the dissent turned to the key subject of authorization.³³⁸

Relying on the secretarial authority to recruit under 5 U.S.C. § 301, the dissenters rejected the “mere housekeeping rule” of *Chrysler Corp. v. Brown*, “which pertained to matters starkly different from ours.”³³⁹ The dissenters concluded, from representations set forth in Army recruiting brochures and correspondence by the secretary of the Navy, that “it is apparent that the recruiters made these promises at the direction of the service secretaries.”³⁴⁰ The dissenters then turned the presumption of regularity on the Government: “[W]e presume that the service secretaries carried out these duties in good faith and in accordance with law when making these promises.”³⁴¹

The dissenters had no quarrel with the proposition that “Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn.”³⁴² It was “quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing.”³⁴³ Such legislative action “would appear in a different constitutional light.”³⁴⁴

Turning then to the majority’s proposition that the promises lacked express authority from Congress and its citation of *Federal Crop Insurance Corp. v. Merrill*, the dissenters took the view that “[t]here is nothing in the regulations or law prior to 1956 that would have prohibited recruiters from making these promises; indeed those regulations appear to authorize them.”³⁴⁵ Further,

335. *Id.* at 1289. The majority opinion also rejected the arguments that Congress had ratified and acquiesced in the recruiting promises. *See id.* at 1289–99.

336. *Id.* at 1300.

337. *Id.* at 1301 (Mayer, J., dissenting). Justice Mayer included a quote from Rudyard Kipling’s poem “Tommy,” a reference to a British soldier. *Id.* at 1301 & n.1 (quoting RUDYARD KIPLING, *TOMMY* (1890), reprinted in *THE NORTON ANTHOLOGY OF POETRY* 868 (3d ed. 1983)).

338. *Id.* at 1304.

339. *Id.* at 1305 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)).

340. *Id.* at 1302.

341. *Id.* (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

342. *Id.* at 1303 (citations omitted).

343. *Id.*

344. *Id.* (citations omitted).

345. *Id.* at 1304 (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)).

“[b]efore 1956, promises of lifetime health care were well within the discretion and power of the secretaries. Funding by Congress of the military’s health care system confirmed this broad delegation.”³⁴⁶

Relying on *Lynch v. United States*, the dissenters pointed out that, when benefits under War Risk Insurance agreements were curtailed by Congress’s repeal of all laws that authorized them, the Supreme Court ruled that “Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.”³⁴⁷ Thus, the *Schism* case looked a lot like *Winstar* and *Mobil Oil*, yielding this conclusion: “The fact that the secretaries’ repudiation of the contracts to provide lifetime health care may have ‘rested upon the enactment of a new statute makes no significant difference.’”³⁴⁸

The dissenters characterized the “suggestion” that the ADA limited the congressional authority delegated by section 301 as “curious.”³⁴⁹ The dissenters insisted that no precedent supported the conclusion that the ADA “precludes the government from contracting with recruits for retirement benefits.”³⁵⁰ Noting that “there has never been a deficiency in funding,” the dissent commented that, even if there had been, “insufficient appropriations” would not “pay the government’s debts, nor cancel its obligations, nor defeat the rights of other parties.”³⁵¹

In sum, *Schism* was not seen as a case where the recruiters’ promises conflicted with the express terms of a statute or regulation, and the dissenters found no legal requirement that the retirees’ claims “must be based on a specifically worded law, rule, or regulation to be valid.”³⁵² In other words: “Where no specific statute or regulation contradicts the terms of a government contract, the validity of the contract depends on common-law rules of contract.”³⁵³

O. 2004—England v. Contel Advanced Systems, Inc.

In *England v. Contel Advanced Systems, Inc.*, the tension between the sovereign’s immunity and its accountability as a contracting party again surfaced—this time in the context of a government breach of a contract that had interest as a component of the price.³⁵⁴ Reversing an ASBCA decision, the panel ma-

346. *Id.* at 1305.

347. *Id.* (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)).

348. *Id.* at 1306–07 (quoting *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 620 (2000)).

349. *Id.* at 1308.

350. *Id.* (citing *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997); 31 U.S.C. § 1341 (1994)).

351. *Id.* (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

352. *Id.* at 1309.

353. *Id.* (citing *Winstar III*, 518 U.S. 839, 870 (1996)). The dissent also concluded that the retirees had a valid takings claim because “[c]ontracts are property.” *Id.* at 1309–10.

354. See *England v. Contel Advanced Sys., Inc. (Contel II)*, 384 F.3d 1372, 1379 (Fed. Cir. 2004).

majority³⁵⁵ took the strict view that, even in this circumstance, the “no interest rule” barred the claim.³⁵⁶

The majority were not persuaded by the ASBCA’s reliance on the character of the lease-to-option-to-purchase (“LTOP”) contract, in which lease payments were deferred until “cut-over,” imposing on the contractor the burden of financing the project.³⁵⁷ Thus, the price had a “component for the time value of money” representing “simply the cost to the Government for the privilege of not paying” until later—amounting to annual interest of 11.32%.³⁵⁸ As found by the Board, the Navy was aware that Contel was financing the project based on the estimated quantity, but also that it was not going to order that quantity.³⁵⁹ Notwithstanding, the Navy delayed a reconciliation until four years after cut-over. At the same time, the Navy “was insistent that the amount borrowed, once the interest over the LTOP term was added, reflect the [unadjusted] LTOP contract price . . . so their records would match. . . .”³⁶⁰

The ASBCA held that this was a breach of the duty to cooperate, causing the contractor to incur \$4.4 million in interest charges over the four-year period.³⁶¹ Payment of the interest, per the ASBCA, was “an integral part of” and “required by the contract.”³⁶²

The Federal Circuit panel majority supported its holding that “the no-interest rule” barred the recovery of such interest damages against the Government by quoting *J.D. Hedin Construction Co. v. United States*: “[L]ike interest on substantive claims against the government, ‘interest paid on bank loans made because of financial stringency resulting from a breach by the Government . . . is not recoverable.’”³⁶³

The majority was unimpressed by the pricing of the contract:

The claim here is not for the interest component of the [lease to ownership (“LTO”)] price, which the Navy has already paid. . . . The inclusion of the interest component in the LTO price is not an “affirmative, clear-cut, [and] unambiguous” agreement to pay for additional interest . . . as a result of the Navy’s breach.³⁶⁴

...

The fact that the Navy was aware of the financing arrangement, and apparently inflexible in its requirements for assignment of the installment payments, is not sufficient to waive the no-interest rule.³⁶⁵

355. Judges Dyk and Lourie.

356. *Contel II*, 384 F.3d at 1374.

357. *See id.*

358. *Contel Advanced Sys., Inc. (Contel I)*, ASBCA Nos. 50648 et al., 03-2 B.C.A. (CCH) ¶ 32,777, at 159,685.

359. *Id.* at 159,684.

360. *Id.* at 159,691.

361. *Id.* at 159,697–98.

362. *Id.* at 159,698.

363. *Contel II*, 384 F.3d 1372, 1379 (Fed. Cir. 2004) (citing *J.D. Hedin Constr. Co. v. United States*, 456 F.2d 1315, 1330 (Ct. Cl. 1972)).

364. *Id.* at 1380 (second alteration in original) (citing *United States v. Thayer-W. Point Hotel Co.*, 329 U.S. 585, 590 (1947)).

365. *Id.*

Waiver of sovereign immunity had to be explicit.

In dissent, Judge Newman recoiled at this unyielding enforcement of “the no-interest rule.”³⁶⁶ On the specifics of this case, she saw the costs as retaining their identity as interest on LTOP borrowings, where it was undisputed that the contract price “included recovery of the interest incurred in the LTOP option.”³⁶⁷ Distinguishing *Hedin Construction*, she articulated this legal proposition: “When damages flow from breach of an obligation that involves money, the nature of the obligation and its relationship to the economic injury must be considered in determining whether the cost of money is properly included in damages.”³⁶⁸

But Judge Newman’s issues with the majority were more fundamental, going to the reach of sovereign immunity:

The basic rule of “sovereign immunity,” that the ruler could not be sued without his consent, was not directed to interest, but to the underlying liability. The ancient bar to recovery of interest . . . reflects the canonical and common law prohibitions of usury, not the divine right of kings. . . . Enlarging the government’s freedom from liability for breach of its obligations is unwarranted. “Sovereign immunity” is not a tool of unfairness to those who do business with government. It should not be uncritically expanded.³⁶⁹

Besides, here, it violated “the national policy of fairness to contractors.”³⁷⁰

P. 2006—Wesleyan Co. v. Harvey

In this case, the court resolved the question of whether there was CDA jurisdiction over Wesleyan’s claim that the Army breached confidentiality agreements by disclosing proprietary information to its competitor.³⁷¹

The confidentiality agreements appeared in documents associated with the Army’s evaluation and purchase of Wesleyan’s product.³⁷² The first of these was an unsolicited proposal, followed by an executed Memorandum of Understanding, “both of which prohibited the government from disclosing information in the proposal to third parties and from using the information for any purpose other than evaluating the proposal.”³⁷³ After a technical review, the Army asked Wesleyan to lend a prototype under a bailment agreement, which was silent on safeguarding proprietary data but stated that it

366. *See id.* at 1382 (Newman, J., dissenting).

367. *Id.* at 1383.

368. *Id.*

369. *Id.* at 1382–83 (citations omitted). Judge Newman’s contention that the “no interest” rule was not a function of sovereign immunity was at odds with *Library of Congress v. Shaw*, 478 U.S. 310 (1985), a strong precedent, although distinguishable as involving the belated receipt of money. Even the dissenters in *Shaw* recognized it as a “corollary of the ancient principle” of sovereign immunity, but rejected the unmistakability canon of construction as a “talismanic formula” that frustrated providing the same rights and remedies enjoyed by private individuals. *Id.* at 323, 326.

370. *Contel II*, 384 F.3d at 1383.

371. *Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006), *reh’g denied* (2006).

372. *Id.* at 1377.

373. *Id.* at 1376.

was “for the limited purpose” of testing and demonstration.³⁷⁴ Thereafter the Army made a series of purchases, most explicitly designated for evaluation or demonstration, all of which were silent as to safeguarding or use of proprietary data.³⁷⁵ However, in connection with these purchases the Army required Wesleyan to sign two similar Policy Statements, the first reading as follows:

The voluntary submissions will be handled in accordance with established Government procedures for safeguarding such articles or information against unauthorized disclosure. In addition, the data forming a part of or constituting the submission will not be disclosed outside the Government or be duplicated, used or disclosed in whole or in part by the Government except for record purposes or to evaluate the proposal.³⁷⁶

The Army terminated its consideration of the Wesleyan system after completing its evaluations.³⁷⁷ Thereafter, according to Wesleyan’s claim, the Army improperly disclosed the proprietary data, which was then incorporated in a competitor’s system bought by the Government.³⁷⁸ The ASBCA dismissed Wesleyan’s claim for \$21 million for lack of CDA jurisdiction.³⁷⁹

The panel majority³⁸⁰ addressed the jurisdictional question by focusing on the statutory language granting jurisdiction over contracts “for the procurement of property. . . .”³⁸¹ Applying these statutory terms, the panel gave its analysis:

Here, three types of agreements are at issue: the unsolicited proposals; the bailment agreement; and the purchase orders. Although the bailment agreement does involve, and the unsolicited proposals arguably involve, the transfer of “property” neither will be “acquisition . . . by such means as . . . renting [or] leasing”, as Wesleyan did not receive any value in exchange. As such, the unsolicited proposals and bailment agreement were donative in nature.³⁸²

On the other hand,

[t]he purchase orders, in contrast, involve the exchange of property for money, and thus involve “procurement.” The Board erred by ignoring this critical exchange. . . . This purchasing activity was sufficient to transform the Army’s relationship with Wesleyan from that of evaluator and bidder to that of buyer and seller.³⁸³

On this basis, the ASBCA was reversed, but only in part.³⁸⁴

But the majority’s analysis still left Wesleyan’s confidentiality claim at risk. First, on remand, the Board would have to find that the terms of the purchase

374. *Id.* at 1377.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 1378.

379. *Id.*

380. Chief Judge Michel and Judge Mayer.

381. *Wesleyan Co.*, 454 F.3d at 1378 (citing 41 U.S.C. § 602(a) (2006)).

382. *Id.* (omissions in original).

383. *Id.* at 1378–79.

384. *See id.*

orders were sufficient to incorporate the confidentiality provisions of the Defense Acquisition Regulation legend, the Memorandum of Understanding, and the Policy Statements.³⁸⁵ Second, and worse: “To succeed, then, Wesleyan must prove that the Army obtained the confidential information that it later disclosed improperly not from the unsolicited proposals, nor from the bailment, but *solely* from the prototypes purchased and evaluated.”³⁸⁶ To this ungenerous analysis and unlikely prospect, the majority added that Wesleyan’s “strategic decision to pursue its claim before the Board . . . significantly limited the scope of its potential relief . . . because, unlike the CDA, the Tucker Act does not require that the contract with the United States relate to procurement.”³⁸⁷

The majority’s jurisdictional disposition predictably did not set well with Judge Newman, who noted that her “concern with the panel majority’s ruling is that it parses the various stages at which the offeror provided confidential information, when all of these stages are part of one overall supply proposition, and are part of one overall claim.”³⁸⁸ She rejected the segregating of “the various steps in this relatively simple procurement”³⁸⁹ as inconsistent with these fundamental principles:

The purpose of the [CDA] is to facilitate the fair and efficient resolution of contract disputes. As explained in testimony during consideration of the Act:

“It is in the Government’s selfish interest to be fair in its dealings with its contractor citizens.”

....

Fairness requires not only protection of the proprietary information of contractors, but also the right to litigate the issue of proprietary information if the ensuing contract is litigated.³⁹⁰

Q. 2006—John R. Sand & Gravel Co. v. United States

In this case, the Federal Circuit ruled that a takings claim was time barred under the Tucker Act’s six-year statute of limitations, notwithstanding the government’s waiver.³⁹¹ The panel majority³⁹² held that the statute of limitations was a condition of the sovereign’s consent to be sued and therefore

385. *See id.* at 1379.

386. *Id.* at 1380 (emphasis added). Apparently no consideration was given to the possibility that the purchase effected a confirmation of the earlier confidentiality promises.

387. *Id.*

388. *Id.* at 1381 (Newman, J., dissenting).

389. *Id.*

390. *Id.* at 1381–82.

391. John R. Sand & Gravel Co. v. United States (*Sand & Gravel I*), 457 F.3d 1345, 1355, 1360 (Fed. Cir. 2006) (citing 28 U.S.C. § 1491(a)(1) (2006)), *reb’g en banc denied & cert. granted in part*, 550 U.S. 968 (2007), *aff’d*, 552 U.S. 130 (2008).

392. Judges Schall and Lourie.

jurisdictional.³⁹³ As such, it could not be waived or equitably tolled.³⁹⁴ Judge Newman dissented strenuously, contending that the Tucker Act limitations statute was “unexceptional” and should be treated like any other affirmative defense.³⁹⁵ The opinions differed not only over prior Supreme Court and Federal Circuit precedents, but also over priorities between protecting the sovereign from suit and providing citizens access to court to pursue claims against the Government. In this case, unlike most of Judge Newman’s dissents, the matter was refereed by the Supreme Court, which also split on the issue.³⁹⁶

The panel majority opinion relied upon a number of Federal Circuit decisions holding that the Tucker Act limitations statute was a “condition of . . . sovereign immunity” and “[d]ue to the jurisdictional nature of section 2501 it may not be waived.”³⁹⁷ The majority also pointed out section 2501’s “long-standing pedigree as a jurisdictional requirement,” citing Supreme Court decisions from the 1880s and 1890s.³⁹⁸ The majority noted that “[t]he dissenting opinion cites several recent Supreme Court decisions in support of the proposition that the statute of limitations set forth at section 2501 is not jurisdictional. . . . None of the foregoing decisions address section 2501.”³⁹⁹

The majority did not, however, specifically address either *Irwin v. Department of Veterans Affairs* or *Franconia Associates v. United States*, principally relied on in the dissent and later prominently discussed in the Supreme Court opinions.⁴⁰⁰

Judge Newman opened her dissent with a plain meaning proposition, noting that section 2501 itself answered the question by stating: “Every claim of which the United States [COFC] *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.”⁴⁰¹ The majority, according to Judge Newman, violated principles of statutory construction by reading the phrase “has jurisdiction” out of the statute.⁴⁰² In addition, she noted that the majority’s interpretation was “also inconsistent with

393. *Sand & Gravel I*, 457 F.3d at 1355.

394. *Id.* at 1354–55.

395. *Id.* at 1362–63 (Newman, J., dissenting).

396. *John R. Sand & Gravel Co. v. United States (Sand & Gravel II)*, 552 U.S. 130, 131 (2008).

397. *Sand & Gravel I*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (majority opinion) (citations omitted). The majority relied chiefly on *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 (Fed. Cir. 1988) (“[S]ince the 6-year limitations period of section 2501 serves as a jurisdictional limitation rather than simply an affirmative defense, such statutes of limitations have been held as not capable of waiver or subject to an estoppel, whether pled or not.”).

398. *Sand & Gravel I*, 457 F.3d at 1355 (citing *Kendall v. United States*, 107 U.S. 123, 125 (1883); *United States v. Wardwell*, 172 U.S. 48, 52 (1898)).

399. *Id.* at 1354 (citations omitted).

400. *Id.* at 1361–65 (Newman, J., dissenting); see *Sand & Gravel II*, 552 U.S. 130, 132–39 (2008).

401. *Sand & Gravel I*, 457 F.3d at 1362 (emphasis added) (citing 28 U.S.C. § 2501 (2006)).

402. *Id.*

the trial court's own rules, which state that the 'statute of limitations' is an 'affirmative defense.'⁴⁰³

Then she turned to the matter of the precedents.⁴⁰⁴ With respect to Federal Circuit precedent, the dissent cited those panel decisions that, in contrast to the panel majority's citations, "correctly interpreted § 2501 as a statute of limitations, not a jurisdictional limit on the [COFC]."⁴⁰⁵ Moreover, she attacked the majority's reliance "on Supreme Court cases interpreting a superseded statute and Federal Circuit panel decisions applying overruled precedent," noting that "[f]or example, *Hopland Band of Promo Indians v. United States* relies on *Soriano v. United States* which interprets § 2501 as a jurisdictional ban not subject to tolling," but "[t]he Court in *Irwin* overruled *Soriano*."⁴⁰⁶

Judge Newman then placed her principal reliance on the Supreme Court decisions in *Irwin* and *Franconia Associates*. *Irwin*, she wrote, "clarified that limitations principles apply to the government 'in the same way' as they are applied to private parties, e.g., they may be tolled or waived in appropriate circumstances."⁴⁰⁷ *Franconia Associates*, she wrote, "rejected the government's attempt to ascribe a 'special' interpretation to § 2501 on a theory of sovereign immunity,"⁴⁰⁸ quoting it as follows:

We do not agree that § 2501 creates a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional. . . . In line with our recognition that limitations principles should generally apply to the Government "in the same way that" they apply to private parties, we reject the Government's construction of § 2501. That position, we conclude, presents an "unduly restrictive" reading of the congressional waiver of sovereign immunity, rather than "a realistic assessment of legislative intent."⁴⁰⁹

On this basis, Judge Newman concluded that it was clearly "incorrect to accord unique status to § 2501 and hold that it is a limit on 'jurisdiction.'"⁴¹⁰

But her conclusion was not clear to a majority of the Supreme Court.⁴¹¹ Although two justices were "in accord with dissenting Judge Newman" and were "perplex[ed]" that their colleagues were not,⁴¹² the majority—in an opinion by Justice Breyer—stood with the nineteenth century precedents and *Soriano*: "Over the years, the Court has reiterated in various contexts this

403. *Id.* (citing COFC Rule 8(c)). Affirmative defenses are, of course, waivable.

404. *Id.* at 1363–64 (citations omitted).

405. *Id.* at 1363 (citing *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998); *Henke v. United States*, 60 F.3d 795, 798 n.3 (Fed. Cir. 1995); *Borough of Alpine v. United States*, 923 F.2d 170, 171 n.1 (Fed. Cir. 1991)).

406. *Id.* (citations omitted).

407. *Id.* (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94–96 (1990)).

408. *Id.* at 1362 (citing *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002)).

409. *Id.* (quoting *Franconia Assocs.*, 536 U.S. at 145).

410. *Id.* at 1363.

411. *Sand & Gravel II*, 552 U.S. 130, 136–38 (2008).

412. *Id.* at 146–47 (Ginsburg, J., dissenting).

or similar views about the more absolute nature of the court of claims limitations statute.”⁴¹³

The Supreme Court majority distinguished *Franconia Associates*, notwithstanding its broad language, as relating only to the accrual of claims under section 2501, not the waiver or equitable tolling issue.⁴¹⁴ Further, the Court’s majority stated that *Irwin* only “mentions” *Soriano* and “says nothing at all about overturning” it.⁴¹⁵ Although the statute in *Irwin* was concededly “similar to the present statute in language,” the Court distinguished it as “unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation.”⁴¹⁶ Thus, “[b]asic principles of *stare decisis* . . . require us to reject” the dissenting view because “[t]o overturn a decision settling on such matter simply because we might believe the decision is no longer ‘right’ would inevitably reflect a willingness to reconsider others.”⁴¹⁷

The Court seemingly acknowledged the awkwardness of its decision with this unusual statement:

Irwin and *Franconia* represent a turn in the course of the law . . . : The law now requires courts, when they interpret statutes setting forth limitation periods in respect to actions against the Government, to place greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds. The older interpretation treated these interests differently. Those older cases have consequently become anomalous.⁴¹⁸

Thus, notwithstanding its own reflection (and Judge Newman’s effort), the Court sustained the Federal Circuit’s “anomalous” and less “equitable” result, in favor of the “special interest” of the sovereign.⁴¹⁹

R. 2007—Grumman Aerospace Corp. v. Wynne

In this case, Grumman appealed the ASBCA’s denial of its superior knowledge claim and the ASBCA’s refusal to award damages based on a jury verdict for the claims that were sustained on other grounds.⁴²⁰ At the Federal Circuit, the panel majority⁴²¹ affirmed the Board on both counts.⁴²²

The controversy arose out of a contract to modernize the avionics for the F-111 aircraft, which was awarded to Grumman after performance of a

413. *Id.* at 135 (majority opinion) (citing *Soriano v. United States*, 352 U.S. 270, 273–74 (1957); *United States v. Greathouse*, 166 U.S. 601, 602 (1897); *United States v. New York*, 160 U.S. 598, 616–19 (1896); *De Arnaud v. United States*, 151 U.S. 483, 495–96 (1894)).

414. *See id.* at 138.

415. *Id.* at 137 (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 94–95 (1990)).

416. *Id.*

417. *Id.* at 139.

418. *Id.* at 138 (citations omitted).

419. *See id.* at 139.

420. *Grumman Aerospace Corp. v. Wynne (Grumman II)*, 497 F.3d 1350, 1352 (Fed. Cir. 2007).

421. Judges Rader and Dyk.

422. *Grumman II*, 497 F.3d at 1352.

prior contract with General Dynamics Corporation (“GDC”).⁴²³ Grumman’s superior knowledge theory rested on the Air Force failure to disclose information about GDC’s prior performance.⁴²⁴ The panel majority sustained ASBCA findings that Grumman had general knowledge of GDC’s difficulties, did not request software data in question, and was advised by the Air Force that it would only provide data that were available and would not, in any event, warrant them.⁴²⁵ With these particularized findings, the panel majority agreed that the superior knowledge standards could not be met.⁴²⁶ The majority noted Grumman’s broad argument that the Air Force had an obligation to disclose GDC’s performance problems, but rejected it: “However, Grumman misinterprets the standard and sets the bar too high. The Air Force did not have an affirmative duty to provide GDC’s contract performance status to Grumman, especially when Grumman did not request the information.”⁴²⁷

With respect to the ASBCA’s refusal to grant a jury verdict on the sustained claims, the panel majority found “no abuse of discretion” in the findings about lack of evidence to support such a damage award.⁴²⁸ However, there was evidence in the form of the Contracting Officer’s “cost figures” that might have been considered, but the Board deemed this evidence out of bounds under *Wilner v. United States*.⁴²⁹ The panel majority, without mentioning *Wilner*, embraced its premise of “the Board’s independent review” explaining: “Because Grumman has the burden to prove damages as a result of Air Force actions, the Board correctly determined that the CO’s figures did not support an equitable adjustment.”⁴³⁰ Thus, these potential evidentiary admissions could not be used, even for a jury verdict.⁴³¹

Judge Newman rejected the panel’s particularized analysis of superior knowledge elements, such as the Air Force refusal to warrant availability or accuracy of specific information.⁴³² Her dissent on entitlement went quickly to a bottom line:

Whether Grumman actually knew that the information that it states it expected from the Air Force was not available or was seriously inadequate is far from clear,

423. *Id.* at 1352–56.

424. *Id.*

425. *Id.* at 1356–57.

426. *Id.* at 1350.

427. *Id.* at 1358 (citations omitted).

428. *Id.* at 1359. Grumman’s case, as the panel noted, was hindered by Grumman’s “premature destruction” of cost records. *Id.*

429. Grumman Aerospace Corp. (*Grumman I*), ASBCA No. 48006, 06-1 B.C.A. (CCH) ¶ 33,216, at 164,622 (“[M]ost importantly, it is well settled that a CO finding of quantum on a contractor claim (that has not been accepted by a contractor as part of a settlement) is not an evidentiary admission of government liability. A contractor has the burden to prove liability and damages *de novo* in an appeal to this board.” (citing *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994))).

430. *Grumman II*, 497 F.3d 1350, 1359 (Fed. Cir. 2007).

431. *See id.*

432. *Id.* at 1360 (Newman, J., dissenting).

but a discrepancy of \$100 million between the bids of the incumbent . . . (who knew of the flaws and inadequacies) and the competitor Grumman is so extreme that some flaw in the bidding information should be considered, for it is clear that the Air Force had knowledge based on which it could not have expected adequate performance at the bid price.⁴³³

This “likely impossibility” should have been communicated prior to award.⁴³⁴ In a memorable line, she commented: “Government procurement is not a game of ‘gotcha.’”⁴³⁵

With respect to damages, the dissent observed that “[t]he Board indeed found that significant additional costs were incurred due to the state of the project as Grumman received it” and that “Grumman was entitled to compensation for at least some of this work.”⁴³⁶ Judge Newman dissented vigorously from the denial of this compensation “only because of the difficulty of measuring precisely what costs were due to precisely what aspects.”⁴³⁷ Instead, this was a “classic” circumstance calling for “the ‘jury-verdict’ method of measuring performance costs in government contracts.”⁴³⁸ Returning to a recurring theme in her dissents, she concluded: “It is neither fair nor just to deny compensation simply because it is hard to measure.”⁴³⁹

S. 2008—Mola Development Corp. v. United States

This *Winstar*-type case exposed differing views whether the FHLBB made a contract when it approved a merger between a failing bank and a bank owned and controlled by Mola.⁴⁴⁰ The majority⁴⁴¹ concluded that the Government merely exercised a regulatory function because its dealings with Mola did not provide “a clear indication of intent to contract.”⁴⁴² Judge Newman, in contrast, found the record indistinguishable from *Winstar* itself, and concluded that the negotiations, documentation, and merger approval evidenced a contract that was breached by FIRREA.⁴⁴³

To a limited extent the judges differed on factual details, but they principally disagreed over what evidence was required to prove that FHLBB promised special accounting treatment of the failing bank’s balance sheet shortfall as “supervisory goodwill.”⁴⁴⁴ This disagreement was foreshad-

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* (citing *Bluebonnet Sav. Bank, FSB v. United States*, 466 F.3d 1349, 1359 (Fed. Cir. 2006); *Raytheon Co. v. White*, 305 F.3d 1354 (Fed. Cir. 2002)).

439. *Id.*

440. *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1373–75 (Fed. Cir. 2008), *reb’g en banc denied* (2008), *cert. denied*, 129 S. Ct. 625 (2008).

441. Judges Dyk and Clevenger.

442. *Mola Dev.*, 516 F.3d at 1378 (citing *D&N Bank v. United States*, 331 F.3d 1374, 1378 (Fed. Cir. 2003)).

443. *Id.* at 1381 (Newman, J., concurring in part and dissenting in part).

444. *See generally id.*

owed by prior panel decisions applying the Supreme Court's decision in *Winstar*.⁴⁴⁵ More generally, the disagreement reflected differing judicial attitudes about what it takes to prove an implied-in-fact contract with the sovereign.⁴⁴⁶

The facts may be summarized as follows. In 1986 the Government was concerned about Merit's financial condition and, as a part of FHLBB's program to avoid exposure for government guarantees of deposits, in 1987 proposed to sell it.⁴⁴⁷ About the same time, Mola began seeking a merger partner for Charter, a bank Mola owned, and decided that Merit might be suitable.⁴⁴⁸ In January 1988 Mola and Merit agreed on a merger subject to the FHLBB approval.⁴⁴⁹ Thereafter, Mola and FHLBB representatives discussed the terms of the regulatory approval. Mola requested that the Government classify the merger as supervisory and allow Mola to make a noncash contribution to bring the merged entity into compliance with capital requirements.⁴⁵⁰ Mola requested certain regulatory forbearances, none of which involved "regulatory treatment of goodwill"; however, Mola continued to require that the merger be classified as "supervisory."⁴⁵¹

In April 1988, Mola submitted its financial application, which included a consolidated balance sheet that listed goodwill as an asset valued at \$10,996,000.⁴⁵² The application called for purchase accounting and an extended period of amortization of goodwill under FASB No. 72.⁴⁵³ An internal FHLBB memorandum recorded this "goodwill to be carried on the books" and commented on the capital-versus-liabilities percentage were it not.⁴⁵⁴ Internal memos recommended that the application be approved as a "supervisory" case.⁴⁵⁵

There followed further negotiations between Mola and FHLBB. At the end of these negotiations, Mola made a cash contribution of \$2.5 million, the requested regulatory forbearances were denied for the most part, but the acquisition was classified as a "Supervisory Case."⁴⁵⁶ The FHLBB approval letter did not explicitly mention regulatory treatment of goodwill.⁴⁵⁷ FHLBB

445. Compare *D&N Bank*, 331 F.3d 1374 (opinion by Michel, C.J., joined by Mayer & Dyk, JJ.), with *Fifth Third Bank of W. Ohio v. United States*, 402 F.3d 1221 (Fed. Cir. 2005) (opinion by Plager, J., joined by Newman & Clevenger, JJ.).

446. See generally *Mola Dev.*, 516 F.3d 1370.

447. See *id.* at 1373.

448. See *id.*

449. See *id.*

450. See *id.* at 1373–74.

451. See *id.* at 1374.

452. See *id.* at 1382 (Newman, J., concurring in part and dissenting in part).

453. See *id.*

454. See *id.* at 1383.

455. See *id.* at 1374 (majority opinion). An internal Federal Housing Loan Bank Board memorandum referred to the resulting benefits of a tax-free reorganization and net operating loss carryforwards of Merit. *Id.*

456. See *id.* at 1382.

457. See *id.*

did not enter into an assistance agreement with Mola—indeed there was no document purporting to be a written agreement.⁴⁵⁸

The merger of Charter and Merit closed with the goodwill of the merged institution valued at \$15,741,000.⁴⁵⁹ Without this goodwill, the merged bank would not have had sufficient capital to meet regulatory requirements and would have been insolvent.⁴⁶⁰ The merger relieved the Government of its obligations to Merit's depositors.⁴⁶¹ When FIRREA and its provisions banning "supervisory goodwill" became effective, the merged entity was no longer in capital compliance and was seized by the Government and liquidated.⁴⁶²

To these facts, the majority applied the holding in *D&N Bank v. United States* that "regulatory proclamations are insufficient to create contractual obligations because . . . [m]ere approval of the merger does not amount to [an] intent to contract" and "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations."⁴⁶³ The majority acknowledged *Fifth Third Bank of Western Ohio v. United States* and its holding that "a formal written agreement is not necessary to prove the existence of a *Winstar* contract" but stressed that "an explicit agreement for the treatment of goodwill had been negotiated" in that case.⁴⁶⁴

The panel rejected Mola's argument that the designation of the merger as "supervisory" was "sufficient evidence of the government's intent to form a contract with respect to the regulatory treatment of goodwill."⁴⁶⁵ The panel noted that same argument had been rejected in *D&N Bank*: "labeling a merger 'supervisory' alone, . . . tell[s] us nothing about the government's intent to contract."⁴⁶⁶ The majority gave no weight to expert testimony linking regulatory treatment of goodwill with the supervisory designation, citing Judge Dyk's controversial ruling in *Rumsfeld v. United Technologies Corp.* that interpretation of accounting regulations is an issue of law on which expert testimony "should not be received, much less considered."⁴⁶⁷

Nor was the majority much interested in context evidence of contractual intent.⁴⁶⁸ The Government's purpose of protecting the public treasury through the supervisory mergers, a context that suggested the FHLBB

458. *See id.* at 1374.

459. *See id.* at 1383 (Newman, J., concurring in part and dissenting in part).

460. *See id.* at 1380 (majority opinion).

461. *See id.*

462. *See id.* at 1373.

463. *Id.* at 1378 (omission and first and second alteration in original) (quoting *D&N Bank v. United States*, 331 F.3d 1374, 1378–79 (Fed. Cir. 2003)).

464. *Id.* (citing *Fifth Third Bank of W. Ohio v. United States*, 402 F.3d 1221, 1231–32 (Fed. Cir. 2005)).

465. *Id.*

466. *Id.* at 1378–79 (omission and first alteration in original) (quoting *D&N Bank*, 331 F.3d at 1380).

467. *Id.* at 1379 n.6 (relying on *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003)). This posed a challenge for Judge Newman because, somewhat surprisingly, she had joined in the *United Technologies* decision. *See generally United Techs.*, 315 F.3d 1361.

468. *Mola Dev.*, 516 F.3d at 1380.

was doing more than regulating, was given little or no attention, and the common-sense context of the transaction—that the merged entity would have been insolvent and out of regulatory compliance ab initio without the supervisory goodwill—“tells us nothing about the government’s intent.”⁴⁶⁹

Judge Newman took a more contextual, less formalistic approach and found a contract that was “not distinguishable in its premises from the contract in [*Winstar*].”⁴⁷⁰ To Judge Newman, “[t]he circumstances and documents left no doubt that a contract including supervisory goodwill was intended and formed, to implement the government’s program created with the sole purpose of encouraging healthy thrifts to acquire insolvent ones in order to reduce the government’s liability to the failing bank industry.”⁴⁷¹

The key point of difference centered on what implication should be drawn from the Government’s classification of the merger as a “supervisory case.”⁴⁷² On this point, Judge Newman relied squarely on *Winstar*, quoting it extensively:

[T]he principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirement imposed by federal regulations.

....

Goodwill recognized under the purchase method as the result of a FSLIC-sponsored supervisory merger was generally referred to as “supervisory goodwill.”

....

Supervisory goodwill was attractive to healthy thrifts for at least two reasons. First, thrift regulators let the acquiring institutions count supervisory goodwill toward their reserve requirement under 12 CFR § 563.13 (1981). The treatment was, of course, critical to make the transaction possible in the first place, because in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards if goodwill had not counted toward regulatory net worth.⁴⁷³

Thus Judge Newman wrote that the panel majority erred in ruling that a supervisory merger does not establish a commitment to this accounting treatment, “for that is what a supervisory merger is about.”⁴⁷⁴ She noted that her colleagues refused to consider expert testimony to this effect, finessing the *United Technologies* decision by not mentioning it, but questioning that refusal on the basis that “the identical principle was explained in *Winstar*.”⁴⁷⁵

469. *Id.* (quoting *D&N Bank v. United States*, 331 F.3d 1374, 1380 (Fed. Cir. 2003)).

470. *Id.* at 1381 (Newman, J., concurring in part and dissenting in part) (citing *Winstar III*, 518 U.S. 839 (1996)).

471. *Id.*

472. *Id.* at 1382.

473. *Id.* at 1381–82, 1384–85 (quoting *Winstar III*, 518 U.S. at 848–50).

474. *Id.* at 1385.

475. *Id.* at 1385 n.1.

Judge Newman concluded that “[a] contract was formed as it was in *Winstar*. Mola’s H-(e)(3) application, the negotiations, the issuance of the certificate of ‘supervisory case,’ and the various conforming documents, verified the contractual arrangement.”⁴⁷⁶ As stated in *Fifth Third Bank*, “[t]he totality of the evidence and the circumstances demonstrate that the parties intended to and did create contractual obligations.”⁴⁷⁷ In her view, “there was a bargained for exchange” resulting in a contract breached by FIRREA and the seizure and liquidation of the merged bank.⁴⁷⁸

T. 2009—Bell BCI Co. v. United States

This case exposed Judge Newman’s disagreement with her colleagues over two fundamentals of the Federal Circuit’s responsibilities: (a) the deference the Federal Circuit, as an appellate tribunal, should give to its trial forums and (b) the rules of contract interpretation the Federal Circuit should apply—in this case to a release contained in a contract modification.⁴⁷⁹ To understand these disagreements, it is necessary to know what the terms of the modification were and how the COFC decided the issue whether the contractor’s cumulative impact claim was barred by the release.

In an initial decision rejecting summary judgment motions, the COFC described the terms of the modification.⁴⁸⁰ The modification described its purpose: “This agreement is to modify the contract and to provide an equitable adjustment for changed work as itemized. . . .”⁴⁸¹ The modification “[i]ncrease[d] the contract amount by \$2,296,963 . . . as full and equitable adjustment for the remaining direct and indirect costs of the Floor 4 Fit-out (EWO 240-R1) and full and equitable adjustment for all delays resulting from any and all Government changes transmitted to the Contractor on or before August 31, 2000.”⁴⁸² The court noted that of this total, \$700,000 was included for “delay damages,” but pointed out the “distinction in the law between: (1) a ‘delay’ claim; and (2) a ‘disruption’ or ‘cumulative impact’ claim. . . . [A] ‘delay’ claim captures the time and cost of *not* being able to work, while a ‘disruption’ claim captures the cost of working less efficiently than planned.”⁴⁸³

Paragraph eight set forth the release language:

The modification agreed to herein is a fair and equitable adjustment for the Contractor’s *direct* and *indirect* costs. This modification provides full compensation for *the changed work*, including both Contract cost and Contract time. The

476. *Id.* at 1385 (citing *Fifth Third Bank of W. Ohio v. United States*, 402 F.3d 1221, 1235 (Fed. Cir. 2005)).

477. *Id.* (quoting *Fifth Third Bank*, 402 F.3d at 1235).

478. *Id.* at 1386.

479. *Bell BCI Co. v. United States (Bell BCI III)*, 570 F.3d 1337, 1343–44 (Fed. Cir. 2009) (Newman, J., dissenting), *reh’g & reb’g en banc denied* (2009).

480. *Bell BCI Co. v. United States (Bell BCI I)*, 72 Fed. Cl. 164, 168–69 (2006).

481. *Id.* at 168.

482. *Id.* at 168–69 (omissions in original).

483. *Id.* at 168 (emphasis supplied) (citing *U.S. Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539, 546 (D.C. Cir. 1982)).

Contractor hereby releases the Government from *any and all liability* under this Contract for further equitable adjustment *attributable to the Modification*.⁴⁸⁴

The COFC noted that the release made no mention of a claim for disruption, cumulative impact, or labor inefficiency and gave this appraisal of the release paragraph: “The terms ‘direct or indirect costs’ and ‘attributable to the Modification’ in this paragraph lack precision and are not elsewhere defined. The Court cannot say whether they were intended to embrace Bell’s potential disruption or cumulative impact claims.”⁴⁸⁵ The court did “not see that the parties included any payment . . . for disruption or cumulative impact” and “similarly [did] not know at this stage when Bell knew or should have known that it had a mature disruption or cumulative impact claim.”⁴⁸⁶ The court observed that “[w]hile certainly a prudent contractor might have explicitly reserved its rights to assert a later disruption claim, the same prudence might have lead [sic] the Government to obtain an explicit release of all disruption or cumulative impact claims.”⁴⁸⁷ Accordingly the court could not conclude that there was “a meeting of the minds” or even consideration “for the release of such claims,” and, therefore, “a full airing at trial appears necessary.”⁴⁸⁸

At the ensuing trial, Bell BCI presented evidence that the modification was limited to compensation for the work directed by the changes (EWOs), that it was given assurances that future changes would be limited (subsequently, there was a deluge of EWOs and changes), and that it did not then contemplate, or intend to release, a cumulative impact claim.⁴⁸⁹ The Government, in contrast, offered no testimony, although it had listed the CO as a witness.⁴⁹⁰ The court inferred that, if she had testified, her testimony would have been unfavorable to or at least “would not have supported defendant’s position.”⁴⁹¹

Using this extrinsic evidence to help interpret the language of the modification, the trial court noted again that the “purpose” was “to provide an equitable adjustment for the changed work,” with no mention or consideration for a cumulative impact or inefficiency claim.⁴⁹² The court recounted the “clear” historic distinction in government contract law between “changed” and “unchanged” work, drawn in the standard Changes clause to avoid the inequitable result of the *Rice* doctrine.⁴⁹³ The court reported the usual practice when there are multiple change orders: “[b]ilateral modifications agreed to by the parties generally cover the costs and time of performing the changed work”

484. *Id.* at 169 (emphasis added).

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Bell BCI Co. v. United States (Bell BCI II)*, 81 Fed. Cl. 617, 622–23 (2008).

490. *Id.* at 639.

491. *Id.* (citations omitted).

492. *Id.* at 622–23.

493. *Id.* at 637, 639 (citing *United States v. Rice*, 317 U.S. 61, 64–65 (1942)) (noting that the *Rice* doctrine limited recovery under the Changes clause to work directly covered by the change).

but, “[u]nless provided otherwise, . . . not for the impact of multiple change orders on the unchanged work.”⁴⁹⁴

Even so, the court also observed that “given the clear distinction in the law between the (1) cost of performing changed work, and (2) the effect of changes on unchanged work, prudent contracting parties surely would be specific in describing the exact scope of any release or reservation of rights.”⁴⁹⁵ The fact that the modification did not address the claim explained why the court held the trial: “to decide whether any provision could be regarded as a ‘meeting of the minds’ on Bell’s cumulative impact claim, or whether any consideration could be identified in settlement of the claim.”⁴⁹⁶ But the Government, even as the draftsman, offered no evidence.⁴⁹⁷ On this trial record, the COFC concluded that the Government had not proved its affirmative defense that Bell’s claim was barred.⁴⁹⁸

It is fair to say that, on appeal, the Federal Circuit panel majority⁴⁹⁹ gave the trial court’s careful, two-opinion analysis short shrift.⁵⁰⁰ The panel found the release language “unambiguous,” explaining that “[t]he language plainly states that Bell released the government from *any and all* liability for equitable adjustments attributable to Mod 93.”⁵⁰¹ The panel acknowledged that “there may be ambiguity as to which claims are ‘attributable to’ a given modification,” but avoided this issue and the COFC’s analysis of it with its view that “we cannot glean any ambiguity about which *types* of claims are released,” apparently because of the reference to “any and all liability.”⁵⁰²

The panel criticized the COFC for not supporting its determination: “The court repeatedly stated that the release did not address cumulative impact or disruption claims, but failed to articulate why this was the case.”⁵⁰³ The panel either did not understand or disregarded the lower court’s articulation of the “clear distinction in the law” between claims for changed work and claims for impact on unchanged work, a distinction between “types of claims” drawn in the Changes clause as amended to counter the Rice Doctrine. Instead, the panel relied on the Government’s argument that “the more than \$2,000,000” was “full compensation for the changed work.”⁵⁰⁴ Without acknowledging the distinction in government contract law, carefully described in the opinion below, the panel inferred that, “in other words, that amount was paid as consideration of Bell’s release” of “*any and all liability*” for all “*types* of claims.”⁵⁰⁵

494. *Id.* at 637.

495. *Id.* at 639.

496. *Id.* (citing *Bell BCI I*, 72 Fed. Cl. 164, 168–69 (2006)).

497. *Id.* at 639–40.

498. *Bell III*, 570 F.3d 1337, 1340–41 (Fed. Cir. 2009).

499. Judges Prost and Rader.

500. See generally *Bell BCI III*, 570 F.3d 1337.

501. *Id.* at 1341 (emphasis supplied).

502. *Id.* (emphasis supplied).

503. *Id.* at 1340.

504. *Id.* at 1341.

505. *Id.*

The release being deemed plain, the majority ignored the trial and resulting findings of fact as to the parties' intent.⁵⁰⁶ The lack of compensation for cumulative impacts and the absence of evidence that a cumulative impact claim was contemplated (much less intended to be released), as found below, and the failure of the Government to present its actual intent were irrelevant—indeed, under the Federal Circuit's plain meaning rule, could not even be considered.⁵⁰⁷

The panel supported its application of the plain meaning rule to releases by citing the Restatement for the proposition that “[t]he rules of interpretation that apply to contracts generally apply also to writings that purport to be releases.”⁵⁰⁸ But this reasoning ignored the Restatement's rejection of the plain meaning rule itself,⁵⁰⁹ on which the majority relied, while ignoring the parties' conduct and the context, as well as specific interpretive rules applicable to releases.⁵¹⁰

Even though accord and satisfaction is an affirmative defense, the panel placed the burden of proof on Bell BCI, citing plainly distinguishable precedent explicitly involving final payment, final release, and contract closeout for this proposition: “[i]f parties intended to leave some things open and unsettled, their intent to do so should be made manifest.”⁵¹¹ The panel majority thus also disregarded long-standing government contract law that releases should be strictly construed.⁵¹² As the Court of Claims had stated, “We need not cite authorities to sustain the fact that a receipt or release, however conclusive its terms, is subject to explanation as to the subject matter of accord and satisfaction.”⁵¹³

Judge Newman's dissent took the majority to task for disregarding the trial court's findings of fact.⁵¹⁴ Without belaboring the analysis of the modification's language, she criticized the majority for “fault[ing] the [COFC] for its recourse to evidence of contractual intent and concerning the meaning of ‘attributable to the Modification.’”⁵¹⁵ Instead, she wrote, “[t]he rules of contract interpretation fully support the trial court's recourse to contractual intent,” which is “a question of fact.”⁵¹⁶

506. See *id.* at 1344 (Newman, J., dissenting).

507. *Id.* at 1346. Having thus disregarded unchallenged, specific findings below, the panel—without citation to the record—stated: “To the extent extrinsic evidence is permitted, however, the government points to evidence indicating Bell ‘knew of the possibility of a cumulative impact claim and also knew how to reserve it,’ but ‘Bell simply failed to do so.’” *Id.* at 1341 (majority opinion) (ostensibly quoting the Government's brief).

508. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 284 cmt. c (1981)).

509. See RESTATEMENT (SECOND) OF CONTRACTS §§ 201–202, 212.

510. See *Bell BCI III*, 570 F.3d at 1341.

511. *Id.* at 1341–42 (alteration in original) (citing *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907)).

512. See, e.g., *L.W. Packard & Co. v. United States*, 66 Ct. Cl. 184, 192 (1928).

513. *Id.*

514. *Bell BCI III*, 570 F.3d at 1344 (Newman, J., dissenting).

515. *Id.*

516. *Id.* at 1346.

The evidence, she noted, “was undisputed” and “is indisputably contrary to my colleagues’ findings.”⁵¹⁷ The majority did not even “suggest” that there was clear error in the findings that it was undisputed that “[m]any of the events relevant to the cumulative impact claim did not arise until after the parties signed Modification 093” and “the parties did not contemplate and did not release the cumulative impact claims that arose after many additional construction modifications.”⁵¹⁸ Also, “[t]he government did not dispute Bell’s testimony that there was no discussion about releasing future claims based on unforeseen and changed circumstances.”⁵¹⁹

Applying some common sense to these facts, she noted that “cumulative impact requires recourse to the contributions that accumulated.”⁵²⁰ Further, in her view, “[t]he principles that underlie government contracting preclude the government from taking unfair advantage of changed circumstances during performance.”⁵²¹ On top of that, the undisputed findings undermined the Government’s affirmative defense under basic concepts of law: “A condition precedent to a valid accord and satisfaction is the establishment of a bona fide dispute over liability, and requires a meeting of the minds as to what is being satisfied.”⁵²²

At the outset of her dissent, Judge Newman summarized her view of its importance and the fundamental failure of her colleagues’ resolution of this government contract dispute:

This case is a compelling illustration of why appellate tribunals should give due weight to the attributes and benefits of the processes of trial, for such processes enable the trial judge to dig deeply into the events, to figure out what happened and what was intended, and to reach a just result. This is no less important in contract cases than in any other area of law, and no less important when the government is a party, for today government business affects a significant portion of the nation’s commerce.⁵²³

This summary stands as her caution against over-reaching appellate review and, by implication, the plain meaning rule.⁵²⁴

U. 2010—Maropakis Carpentry, Inc. v. United States

In this case, Maropakis appealed a final decision assessing \$303,550 in liquidated damages.⁵²⁵ The complaint at the COFC alleged government delays

517. *Id.* at 1344.

518. *Id.* at 1346 (alteration in original) (quoting *Bell II*, 81 Fed. Cl. 617, 639 (2008)).

519. *Id.* at 1345.

520. *Id.* at 1346.

521. *Id.*

522. *Id.* (citations omitted).

523. *Id.* at 1343.

524. It would be an overstatement to report that Judge Newman has rejected the plain meaning rule per se because she has joined in several opinions relying on it, including the Federal Circuit’s en banc decision in *Coast Federal Bank FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003). For a discussion of different versions of the plain meaning rule, see 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.12 (3d ed. 2004).

525. *M. Maropakis Carpentry, Inc. v. United States (Maropakis II)*, 609 F.3d 1323, 1325–26 (Fed. Cir. 2010).

and sought both damages for breach and relief from the Government's assessment.⁵²⁶ The Government had retained the balance due on the contract and counterclaimed for the remainder.⁵²⁷ At the COFC, the Government moved to dismiss the contractor's affirmative claim for lack of jurisdiction and moved for summary judgment on its liquidated damage claim.⁵²⁸ Both motions relied on the contractor's failure to file a formal claim as defined by the FAR implementing the CDA, based on the government-caused delays.⁵²⁹

The disagreement within the Federal Circuit panel centered on whether the contractor was thereby barred from presenting its defense to the Government's claim on appeal. Maropakis had submitted letters requesting time extensions but had not pursued them by making a formal written demand that specified and supported a total number of days of extension.⁵³⁰ Nor had the contractor made a request for final decision on its requests. The parties exchanged correspondence on the Government's liquidated damage claims, in which the contractor referred to its earlier letters and stated that it would dispute any assessment of liquidated damages.⁵³¹ The contractor also asserted that the Government knew of its requests and their basis,⁵³² and the Government apparently did not deny its role in delays.⁵³³ But these facts did not deter the COFC from barring the excusable delay defense to the liquidated damages on procedural grounds.⁵³⁴

The panel majority agreed.⁵³⁵ First, the court sustained the dismissal of Maropakis' affirmative complaint for money, addressing the CDA requirements. The court noted that "[a] claim cannot be based merely on intent to assert a claim without any communication by the contractor of a desire for a contracting officer decision."⁵³⁶ Furthermore, "[e]ven assuming the government's knowledge of Maropakis' contentions along the way, there is nothing in the CDA that excuses contractor compliance with the explicit CDA claim requirements."⁵³⁷ The majority stated that it was bound by the sovereign immunity canon of statutory construction, reminding that "we have recognized that the CDA is a statute waiving sovereign immunity," which "must be strictly construed in favor of the sovereign."⁵³⁸

The panel majority then applied these CDA requirements to Maropakis' "factual defenses" to the government claim, noting that "[w]e disagree" that

526. *M. Maropakis Carpentry, Inc. v. United States (Maropakis I)*, 84 Fed. Cl. 182, 184, 194 (2008).

527. *Id.* at 194.

528. *Id.*

529. *Id.* at 195–208.

530. *Maropakis II*, 609 F.3d at 1326.

531. *Id.*

532. *Id.*

533. *Id.* at 1332 (Newman, J., dissenting).

534. *Maropakis I*, 84 Fed. Cl. 182, 208 (2008).

535. Judges Linn and Lourie. *Maropakis II*, 609 F.3d at 1332 (majority opinion).

536. *Id.* at 1328 (citations omitted).

537. *Id.* at 1329 (citing 41 U.S.C. § 605 (2006)).

538. *Id.*

CDA requirements that would otherwise apply to Maropakis' affirmative claim for entitlement "no longer apply" in the context of a defense to a government claim.⁵³⁹ Referring to "Maropakis' styling of its claim as a defense," the panel majority concluded: "Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action."⁵⁴⁰

Judge Newman opened her dissent by stating that she did not "share the view that there is no 'jurisdiction' to consider the defense to the government's claim."⁵⁴¹ But that appears from the rest of the dissent to be an understatement on her part, as she wrote, "When a claim is within a tribunal's jurisdiction, like the government's claim for delay damages, the tribunal routinely has jurisdiction to consider defenses to the claim. This rule is not negated by any provision of the [CDA]."⁵⁴²

This rule, she contended, was confirmed by the Federal Circuit in *Garrett v. General Electric Co.*, where "[j]urisdiction was based on the government's claims, not the contractor's objection to that claim."⁵⁴³ As the court said in that case, "[t]he Act, however, provides that a contractor may appeal a Government claim . . . without submitting a claim of its own to the CO."⁵⁴⁴ This binding precedent, in her view, "is contravened by the court's decision today" because it "now requires a separate jurisdictional basis for the contractor's objection to the government's claim."⁵⁴⁵

Judge Newman insisted that "a defense does not have a jurisdictional dimension" and "[p]recedent respects the distinction between a claim and a defense."⁵⁴⁶ Footnoting to the famous Lincoln statement about the duty of the Government to render prompt justice against itself that is "engraved at the entrance to this courthouse," she concluded her spirited dissent:

The right to defend against an adverse claim is not a matter of "jurisdiction," nor of grace; it is a matter of right. The denial of that right, argued by the government on a theory of "jurisdiction" that was supported by the [COFC] and is now supported by this court, is contrary to the purposes of the CDA, contrary to precedent, and an affront to the principles upon which these courts were founded.⁵⁴⁷

539. *Id.* at 1329–30.

540. *Id.* at 1331.

541. *Id.* at 1332 (Newman, J., dissenting).

542. *Id.* at 1333.

543. *Id.* (citing *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993)).

544. *Id.* (citing *Garrett*, 987 F.2d at 749).

545. *Id.* The majority, noted the dissent, suggested that *Garrett* only resolved the question of jurisdiction over the Government's claim, not the question of General Electric's defenses. *Id.* at 1330 n.1 (majority opinion). But one wonders why the Navy sought to dismiss the appeal if not to forestall those defenses. There were similar disagreements over other decisions of the Federal Circuit and the Claims Court. One also wonders whether the parties apprised the judges of the Federal Circuit's decision in *Malone v. United States*, 849 F.2d 1441, 1444 (Fed. Cir. 1988), where the court found jurisdiction over the termination for default and sustained contractor defenses of material breach, even though no breach claim had been submitted to the CO.

546. *Maropakis II*, 609 F.3d at 1333–34 & n.2 (Newman, J., dissenting).

547. *Id.* at 1334–35 & n.3 (citing Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861)).

IV. THE SIGNIFICANCE OF JUDGE NEWMAN'S DISSENTS

Lawyers usually find it interesting when judges disagree on the proper disposition of a case. The foregoing many cases in which Judge Newman dissented between 1991 and 2010 are not exceptions. Each case has its own unique facts and particular law to apply—in effect, its own legal story. The differing judicial opinions, set forth above, hopefully allow the reader to judge which analysis and which resolution was right. I suspect the reader will, with a few possible exceptions, find that his or her own judgments will turn on fundamental views about what the relationship between the sovereign and its contractors should be—and what the role of the Federal Circuit in overseeing that relationship should be.

That is what is so interesting about these decisions taken together because, in all of them, that seems to be what separated Judge Newman from her colleagues. Judge Newman has been making a continuing statement that her colleagues are wrong on these fundamentals and have taken the Federal Circuit in a troubling direction.

A. *The Theme of Government Accountability Under Contract Law*

One does not have to agree with all of Judge Newman's dissents to admire her persistent—and largely lonely⁵⁴⁸—advocacy of fairness in the adjudication of contractor disputes with the sovereign. At the core of Judge Newman's dissenting jurisprudence is the premise that the sovereign as a contracting party should be accountable for its actions, subject only to limited exceptions not to be presumed, unnecessarily expanded, or imposed in a formalistic, doctrinaire way that ignores or masks the facts of government conduct. Where the facts justify it, contractors should be entitled to a “fair and just” remedy, and the Federal Circuit is there to make sure this happens.

Her jurisprudence is so consistent with the authorized history of the jurisdiction inherited from the Court of Claims, declaring the court as a nation's “conscience,” that one wonders why she appears a maverick among the judges of the Federal Circuit. And why is she so frequently alone in objecting to obstacles to justice raised by her colleagues, frustrating the court's historic “unique and permanent contribution” of making “Government officials accountable”?⁵⁴⁹

Judge Newman's dissents have prevailed in two important instances. Of the three dissents that were considered by the Supreme Court, two were sustained.⁵⁵⁰ Perhaps her high-water mark was in the *Winstar* case, where most

548. There were en banc decisions and dissents in which she was joined by colleagues, including Judge Plager, whose critical language sometimes rivaled Judge Newman's. For example, in *Schism II*, he referred to the majority opinion as a “display” of “public ingratitude.” 316 F.3d 1259, 1311 (Fed. Cir. 2002).

549. COWEN ET AL., *supra* note 4, at 170.

550. See *Winstar III*, 518 U.S. 839 (1996); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000).

of the en banc Federal Circuit agreed with her dissent that sovereignty arguments could not vitiate contract promises the Government made to induce successful banks to relieve the Government of its multibillion-dollar obligations to depositors in failing banks.⁵⁵¹ The Government's perfidy was apparently so palpable that a majority of the Federal Circuit could not tolerate it. The Supreme Court also agreed, over a dissent by Chief Justice Rehnquist.⁵⁵² The Court's principal opinion emphasized "the Government's own long-run interest as a reliable contracting partner" and revived the long-standing, fundamental rule that the Government's contractual "rights and duties . . . are governed generally by the law applicable to contracts between private individuals."⁵⁵³ *Winstar* was followed by her dissent sustained by the Supreme Court in *Mobil Oil*.⁵⁵⁴ The Court enforced the same rule of government accountability under "basic contract law principles," specifically as stated in the Restatement.⁵⁵⁵

Most of Judge Newman's dissents work within the framework of this rule—indeed, it is sometimes at the core of her disagreement with her colleagues. Her consistent emphasis on contract accountability—with its underlying concepts of integrity of contracts, intent of the parties, fair dealing, fact-based adjudication, and just results—is plainly in line with the Restatement and principles of adjudicating contract disputes. Indeed her contract jurisprudence seems so mainstream and consistent with the court's historic mission that it is fair to ask what is going on at the Federal Circuit.

B. *Conflicting Signals from the Supreme Court*

Of course, the *Winstar* and *Mobil Oil* accountability rule is limited by the word "generally," presenting an ambiguity for the Federal Circuit, with its exclusive jurisdiction, to sort out. Ultimately, though, the Supreme Court is the keeper of its undefined caveat, and it has not been silent on the subject. Two decisions roughly contemporaneous with *Winstar* and *Mobil Oil* indicated limits on the rule and mixed the signals from the high Court.⁵⁵⁶ To put Judge Newman and her colleagues in perspective, it is instructive to review them.

In its 1988 decision in *Richmond v. OPM (Richmond I)*, the Federal Circuit⁵⁵⁷ estopped the Government from denying a pension claim, where the pensioner had relied on erroneous Navy advice and an out-of-date and therefore erroneous OPM letter provided to him that he would not forfeit his pension.⁵⁵⁸ The court acknowledged the "long established rule" charging citizens with

551. See discussion *supra* Section III.D.

552. See generally *Winstar III*, 518 U.S. 839.

553. *Id.* at 883, 895 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

554. *Mobil Oil*, 530 U.S. 604; see discussion *supra* Section III.J.

555. See *Mobil Oil*, 530 U.S. at 607.

556. See *Hercules, Inc. v. United States (Hercules II)*, 516 U.S. 417 (1996); *OPM v. Richmond (Richmond II)*, 496 U.S. 414 (1990).

557. Per Judge Michel.

558. *Richmond v. OPM (Richmond I)*, 862 F.2d 294, 299 (Fed. Cir. 1988).

knowledge of law and limitations of authority but disclaimed “rigid adherence” to it, observing that the Supreme Court had not foreclosed estoppel in all circumstances.⁵⁵⁹ The Federal Circuit cited its own precedent for the proposition that “[t]he equitable doctrine of estoppel is available to parties contracting with the government” based on a “case-by-case determination designed to avoid injustice.”⁵⁶⁰ Judge Michel concluded the opinion with this confident thought: “Our decision is not a departure from our own or Supreme Court precedent.”⁵⁶¹

The Supreme Court took a dim view of this decision.⁵⁶² In its 1990 reversal, the Court emphasized the “clarity” of its earlier estoppel decisions, reasserting *Federal Crop Insurance Corp. v. Merrill*, where the Court “recognized that, ‘not even the temptations of a hard case’ will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard ‘the duty of all courts to observe the conditions defined by Congress for charging the public treasury.’”⁵⁶³ *Merrill* was thus still powerful law, and the Court for the first time backed it up by relying on the Appropriations Clause of the Constitution, granting Congress control over public funds.⁵⁶⁴

The Court set about “to settle the matter of estoppel as a basis for money claims against the Government,” calling for “a most strict approach to estoppel claims involving public funds.”⁵⁶⁵ The Court delivered what can only be described as a lecture to the Federal Circuit on the subject, noting that “[a]s for monetary claims, it is enough to say that the Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.”⁵⁶⁶

The Court admonished against “‘tamper[ing] with these established principles because’ . . . acceptance of estoppel claims for Government funds could have pernicious effects . . . [including] imposing an unpredictable drain on the public fisc.”⁵⁶⁷ Even though the judges of the Federal Circuit later continued to theorize that estoppel on a government contract might be possible,⁵⁶⁸ they

559. *Id.* at 296, 300.

560. *Id.* at 297 (first alteration in original) (quoting *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987)).

561. *Id.* at 301.

562. See generally *Richmond II*, 496 U.S. 414 (1990). For a more extensive (and more optimistic) discussion of the impact of these decisions, see Alan I. Saltman’s brilliant analysis of *The Government’s Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continuing Influence of Merrill and Richmond*, 32 PUB. CONT. L.J. 775 (2003).

563. *Richmond II*, 496 U.S. at 420–21 (citing *Fed. Crop Ins. Corp. v. Merrill*, 322 U.S. 380, 385–86 (1947)).

564. See *id.* at 428.

565. *Id.* at 426 (citations omitted).

566. *Id.* at 434.

567. *Id.* at 432–33 (citations omitted).

568. See *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (limiting the *Richmond II* holding to monetary claims “contrary to a statutory appropriation”). Interestingly, estoppel was raised in *Burnside-Ott* because other theories of recovery for changed wage determinations were barred by the precedent of *Emerald Maintenance*. See *id.* at 1579–80 (citing *Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1430 (Fed. Cir. 1991)).

could not have missed *OPM v. Richmond*'s broader message that the Federal Circuit has a mission to protect the public fisc.

In *Hercules, Inc. v. United States*, decided shortly before *Winstar*, the Supreme Court declined to hold the Government accountable when presented with serious inequities caused by its conduct in an express contract.⁵⁶⁹ The contractors sought to recover from the Government for product liability settlements arising from their production and government use of Agent Orange.⁵⁷⁰ The Government had required the contractors "to produce under the authority of the [Defense Procurement Act] and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized [their] processing facilities."⁵⁷¹ The Federal Circuit did not resolve factual issues on the merits of government responsibility under an implied warranty of specifications,⁵⁷² but denied the claims for lack of causation of damages because the contractors could have litigated and avoided tort liability under the government contractor defense⁵⁷³ established in *Boyle v. United Technologies Corp.*⁵⁷⁴ subsequent to the Agent Orange settlement.

Chief Justice Rehnquist, writing for the Supreme Court majority, did not even address the Federal Circuit's rationale, the issue on which certiorari had been granted, instead deciding the question of government accountability.⁵⁷⁵ He cast aside the warranty of specifications long before established by the Court in *United States v. Spearin*, notwithstanding *Spearin*'s broad statement that "if the contractor is bound to build according to plans and specifications prepared by [the Government], the contractor will not be responsible for the consequences of defective plans and specifications."⁵⁷⁶ The Court held (without citation to authority) that the warranty did not extend "beyond [contract] performance to third-party claims against the contractor."⁵⁷⁷ The chief justice thought it would be "strange to conclude that the United States" intended such an extended warranty when it had no liability to the third parties.⁵⁷⁸

The primary theme of the majority opinion is that the sovereign's consent to suit is limited to "contracts either express or implied in fact, and not to claims on contracts implied in law."⁵⁷⁹ Most significantly, the chief justice added that "[e]ach material term of contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation."⁵⁸⁰ This ad-

569. *Hercules II*, 516 U.S. 417, 430 (1996).

570. *Id.* at 419–20.

571. *Id.* at 426.

572. *Hercules, Inc. v. United States (Hercules I)*, 24 F.3d 188, 197 (Fed. Cir. 1994). The panel rejected other theories of entitlement. *See id.*

573. *Id.* at 198.

574. 487 U.S. 500, 512 (1988).

575. *Hercules II*, 516 U.S. at 422.

576. *Id.* at 424 (alteration in original) (citing *United States v. Spearin*, 248 U.S. 132 (1918)).

577. *Id.* at 425.

578. *Id.*

579. *Id.* at 423 (citations omitted).

580. *Id.* (citation omitted).

ditional caveat barred the contractors' contentions, such as for an implied indemnification arising from the extraordinary combination of government control and coercion, because in the Court's view the contractors could not establish an implied-in-fact basis for such government responsibility.⁵⁸¹ This conclusion was drawn in part by implication from the ADA—again a focus on congressional control of public funds—which led the Court “to think that a [CO] would not agree to the open-ended indemnification alleged here.”⁵⁸²

Chief Justice Rehnquist concluded the opinion by rejecting the contractors' pleas of “simple fairness” based on “the unmistakable inequities” involved.⁵⁸³ He observed that the contractors' pleas betrayed “the weakness of their legal position,” and added that “in any event we are constrained by our limited jurisdiction and may not entertain claims based merely on equitable considerations.”⁵⁸⁴

Justice Breyer dissented that the Court had “unnecessarily restrict[ed] *Spearin* warranties” and summarily denied the contractors the opportunity to prove an implied-in-fact promise based on the combined “factual circumstances.”⁵⁸⁵ Those circumstances—“compelled production, superior knowledge, detailed specifications, and significant defect”—suggested “that a government, dealing in good faith with its contractors, would have agreed to the ‘implied’ promise, particularly in light of legal authorities, known at the time, that offered somewhat similar guarantees to contractors in somewhat similar circumstances.”⁵⁸⁶ To this conclusion, Justice Breyer added this apprehension:

I fear that the practical effect of disposing of the companies' claim at this stage of the proceeding will be to make it more difficult, in other cases, even if not here, for courts to interpret Government contracts with an eye toward achieving the fair allocation of risks that the parties likely intended.⁵⁸⁷

The tension between the Court's decisions in *Winstar* and *Hercules* is amply demonstrated by Chief Justice Rehnquist's dissent in *Winstar*. In his view, the decision had made the Sovereign Acts doctrine a “shell.”⁵⁸⁸ His colleagues had read “additional terms into the contract so that the contract contains an unstated, additional promise to insure the promisee against loss” arising from subsequent legislation, which seemed “the very essence of a promise implied in law, which is not even actionable under the Tucker Act, rather than a promise implied in fact, which is.”⁵⁸⁹ Further the chief justice objected sharply that the *Winstar* decision had the effect of “changing the status of the

581. *Id.* at 426–27.

582. *Id.*

583. *Id.* at 430.

584. *Id.* (citations omitted).

585. *Id.* at 441 (Breyer, J., dissenting).

586. *Id.*

587. *Id.*

588. *Winstar III*, 518 U.S. 839, 931 (1996) (Rehnquist, C.J., dissenting).

589. *Id.* at 930 (citing *Hercules II*, 516 U.S. 416, 423 (1996)).

Government to just another private party under the law of contracts,” contrary to “the necessity of protecting the federal fisc.”⁵⁹⁰

C. *The Impact at the Federal Circuit*

Richmond and *Hercules*, considered in the context of the general rule of *Winstar* and *Mobil Oil*, obviously confront the Federal Circuit with several challenges: How can the court’s general duty to hold the Government accountable under the law of contracts be harmonized with its duty to protect the sovereign and its funds? Which judicial duty has priority? Should lines be drawn to preserve the general rule? If so, where?

And what of Justice Breyer’s “fear” of losing “the fair allocation of risks that the parties’ likely intended”? Ironically, Justice Breyer did not help matters when, a decade later, he authored the Court’s opinion in *John R. Sand & Gravel*.⁵⁹¹ Rejecting Judge Newman’s dissent, he upheld the “older,” “jurisdictional” interpretation of the Tucker Act statute of limitations, solely because of *stare decisis*, and explained that “[t]he law now requires courts, when they interpret statutes setting forth limitation periods in respect to actions against the Government, to place greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting the public funds.”⁵⁹²

However, in another decision reviewing the Federal Circuit in the same term, the Supreme Court clarified and weakened the long-standing, oft-cited maxim that waivers of sovereign immunity should be strictly construed.⁵⁹³ In *Richlin Security Services Co. v. Chertoff*, where jurisdiction and entitlement were clear, the Federal Circuit limited the remedy based on that strict canon of statutory construction.⁵⁹⁴ The Supreme Court reversed, allowing more recovery, and explained that “[t]he sovereign immunity canon is just that—a canon of construction. It is a tool of interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.”⁵⁹⁵

This must have come as a surprise to Judge Newman’s colleagues at the Federal Circuit, who, in many cases as in *Richlin*, treated the sovereign immunity canon as compelling and controlling.⁵⁹⁶ So *Richlin* added to the mixed

590. *Id.* at 937.

591. See discussion *supra* Section III.Q.

592. *Sand & Gravel II*, 552 U.S. 130, 138 (2008).

593. See *Richlin Sec. Serv. Co. v. Chertoff (Richlin II)*, 553 U.S. 571, 589–90 (2008).

594. *Richlin Sec. Serv. Co. v. Chertoff (Richlin I)*, 472 F.3d 1370, 1374 (Fed. Cir. 2006). Judge Plager dissented, emphasizing the “rights-vindicating” purpose of the statute. *Id.* at 1383 (Plager, J., dissenting).

595. *Richlin II*, 553 U.S. at 589. The unanimous Court added that “the cases on which the Government relies all used other tools of construction in tandem with the sovereign immunity canon” and “[t]here is no need to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.” *Id.*

596. *E.g.*, *Levernier Constr. Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991) (“It is an error to suppose that the ordinary canons of statutory construction are to be applied in this context, if they would add anything to what Congress has expressly said.” (quoting *Fid. Constr. Co. v. United States*, 700 F.2d 1379, 1386 (Fed. Cir. 1983))).

signals from the Supreme Court, to be sorted out by the judges of the Federal Circuit.

In some respects the differences between Judge Newman and her colleagues involve this sorting out process—with Judge Newman on what might be called the liberal equitable side and the majorities on the conservative, stricter side of the divide. No doubt the concepts of constrained authority, limited jurisdiction, and protection of the Treasury make it more difficult to apply the general contract law to the sovereign, but should they make the general rule the exception?

Hercules and *Richmond*, not surprisingly, appear to have resonated within the Federal Circuit—and may have brought about a turning point in Federal Circuit decision making, reawakening what many had considered the residuum of traditional sovereignty law as applied to the Government's contracts.⁵⁹⁷ But these decisions and their admonitions clearly did not resonate with Judge Newman, whose dissents emphasize facts and fairness and do not mention *fisc*. She therefore may reasonably be seen in the context of decisions involving these kinds of sovereignty issues as serving the interests of contractual fairness and accountability by testing (or “tampering” with) lines of sovereign defense drawn by her colleagues.

This is most clearly suggested by *Johnson Management*, where she explicitly juxtaposed principles of contractual accountability and contract integrity, drawn from *Winstar* and *Mobil Oil*, against *Richmond* and *Merrill*. Similarly, the remedies Judge Newman envisioned in *AT&T*, and the prior Federal Circuit precedent that might have supported them, were compromised by both *Richmond* and *Hercules*. Although the COFC and the Federal Circuit ultimately rejected AT&T's claim based on a reading that the specific statute in question was unenforceable, the COFC in its first decision—issued shortly before *Hercules*—approved *quantum meruit* relief for an illegal, void contract.⁵⁹⁸ Thereafter, the Federal Circuit majority ruled out such implied-in-law or equitable relief, citing the intervening Supreme Court decision.⁵⁹⁹

Mola Development, itself a *Winstar*-type case, illustrates this tension by presenting a disagreement over whether the Government's approval of a bank merger as “supervisory” involved a contractual promise that was breached by the implementation of FIRREA, resulting in government seizure of the merged bank.⁶⁰⁰ Judge Newman dissented that the circumstances could not

597. See generally Saltman, *supra* note 562 (describing “functionalist” trends).

598. See discussion *supra* Section III.I.

599. *AT&T I*, 124 F.3d 1471, 1479 (Fed. Cir. 1997) (citing *Hercules II* for the proposition that “it is well established that the Court of Federal Claims does not have the power to grant remedies generally characterized as those implied-in-law, that is, equity-based remedies, as distinguished from those based on actual contractual relationships”). Judge Newman's dissent from this ruling and her subsequent en banc opinion established that the contract was not void ab initio, perhaps avoiding *Hercules* and—in her view—paving the way for consideration of AT&T's claim on its merits. See *id.*; *AT&T II*, 177 F.3d 1368 (Fed. Cir. 1999). When this failed on other grounds not previously stated, she dissented again. See discussion *supra* Section III.K.

600. See discussion *supra* Section III.S.

be distinguished from the *Winstar* precedent.⁶⁰¹ The majority denied the existence of a contract, in an opinion that required more formalistic than contextual analysis and read more like Chief Justice Rehnquist's dissent in *Winstar*. Like the chief justice in *Hercules*, the majority in *Mola Development* were reluctant to imply a contract from the facts.

Schism is also a good example. There the Federal Circuit's judges differed over which Supreme Court principles were controlling—with the dissenters contending that *Merrill* and the ADA did not preclude the service secretaries' recruiting contracts, citing *Winstar* for the proposition that “[t]he government has the power to enter into contracts that confer rights, and has the duty to honor them.”⁶⁰²

Judge Newman also has differed from her colleagues on applying the canon calling for strict construction of waivers of sovereign majority. Where a jurisdictional statute is interpreted, the majorities have found the canon controlling, while she has given it little attention, instead forming her position based on different methods of construction. In *Pacrim Pizza* she reconciled the pre-existing precedents to permit jurisdiction, obviously influenced as well by the contract's promise of appeal rights.⁶⁰³ Breach of that government promise, she thought, was “a travesty of fair dealing,” whereas the majority strictly held that the sovereign could not be charged with that “error.”⁶⁰⁴ While the disagreement over the prior precedents presented an arguable question, Judge Newman's view may have been more attuned to the Supreme Court's 2008 instruction in *Richlin* that the strict construction canon was not controlling, where other methods of construction resolved the interpretive question.

The majority's 2010 *Maropakis* decision seems extreme in and of itself, but it is all the more so after *Richlin*. The majority denied jurisdiction to hear the contractor's defense to a government claim, the appeal from which was within the COFC's jurisdiction, reading the CDA as requiring a formal, affirmative claim as a condition of defending.⁶⁰⁵ The majority stated its built-in legal predisposition: the jurisdictional statement “*must* be strictly construed *in favor of the sovereign*.”⁶⁰⁶ Judge Newman, appalled at the unfairness of leaving the contractor defenseless, reasoned that the majority's construction was inconsistent with the remedial purposes of the CDA and insisted that, under any construction, “the right to defend” against a government claim “is not a matter of jurisdiction.”⁶⁰⁷

In these cases involving sovereignty issues, the majorities assert that the court had no choice, no matter how “sympathetic” the claim or “unpleasant”

601. *Id.*

602. *Schism II*, 316 F.3d 1259 (Fed. Cir. 2002) (Mayer, J., dissenting) (citing *Winstar III*, 518 U.S. 839, 884 n.28 (1996)).

603. See discussion *supra* Section III.M.

604. *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1299 (Fed. Cir. 2002).

605. See discussion *supra* Section III.U.

606. *Maropakis II*, 609 F.3d 1323, 1329 (Fed. Cir. 2010) (emphasis added) (citation omitted).

607. *Id.* at 1334–35 (Newman, J., dissenting).

the decision is. The *Schism* decision, as an example, ended with a statement of the court's limited authority that mirrored the concluding paragraphs of Chief Justice Rehnquist's opinion in *Hercules*.⁶⁰⁸ In other words (that might have been picked by Judge Newman), the court was saying that it was helpless to do justice and forced to be unfair.

D. *The Federal Circuit's "Decisional Attitude"*

But judicial helplessness is not the entire story. Supreme Court constraints on the court's adjudicative power are insufficient to explain most, if not all, of the decisions from which Judge Newman dissented. The dissents, for the most part at least, provide a rational basis for doing contractual justice without offending fundamental principles of sovereignty. Usually the dissents resolve underlying issues in ways that avoid the constraints, rather than confronting them, and would seem to allow the court to hold the Government accountable, consistent with the court's declared historic mission. Moreover, most of the majority decisions she challenged did not involve traditional sovereignty issues at all, many instead turning even on issues of "simple contract law." Indeed, the Federal Circuit's pattern of decision making in the past decades has led a leading commentator to conclude that the Federal Circuit's "decisional attitude" has changed.⁶⁰⁹ The decisions Judge Newman dissented from support his apt phrase.

1. Choosing to Invoke Sovereign Protections

The decisions evidence the Federal Circuit's disinclination to make choices in favor of government accountability; instead they show choices to raise sovereign obstacles. Notwithstanding the majority's concluding lament, *Schism* is also a good example here. The dissenters offered a compelling argument for an authorized implied-in-fact contract. The majority's argument had to deal with inconsistencies (such as authorized health care actions under section 301 and the presence of funding) that made it seem difficult.⁶¹⁰ As Judge Plager wrote in dissent, it was "sad" that the court "places an ability to parse statutes and rules in the Government's favor above the more fundamental obligation to apply the law, when the issue is an open one. . . ." ⁶¹¹ One does not have to agree with Judge Plager's "parsing" comment to see from the competing arguments that the Federal Circuit's judges were free to choose whether the promises to the servicemen were authorized.

608. Compare *Schism II*, 316 F.3d 1259, 1300 (Fed. Cir. 2002), with *Hercules II*, 516 U.S. 417, 430 (1996).

609. Ralph C. Nash Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 588 (2010). Professor Nash identifies as possible explanations the Federal Circuit's intent "to impose strict rules" of government contract law, to "impose more rigorous standards on the . . . draft[ing] and perform[ance] of government contracts," and to limit fact-finding discretion due to "a mistrust of trial judges." *Id.* at 612–14.

610. See discussion *supra* Section III.N.

611. *Schism II*, 316 F.3d at 1311.

A similar choice was presented where the cases—and the relevance of sovereignty issues—turned on an evaluation of the conduct of the parties. In *Wesleyan*, no Supreme Court decision required the majority to “parse” the contractor’s submissions of proprietary information into separate transactions, the first two not meeting the majority’s strict definition of the CDA term “procurement,” with the result that enforcement of government promises of confidentiality was frustrated by lack of jurisdiction.⁶¹² The majority made this choice without help from the Supreme Court.

In *Contel*, the majority had the choice of accepting the ASBCA’s conclusion that the contract required the contractor to finance the project prior to receiving payment and the Government therefore agreed to pay interest as an “integral” part of the contract price, including interest covered when government action increased the costs required to be financed.⁶¹³ The majority chose to reject the ASBCA’s reasonable view, freeing the Government from liability based on the “no interest rule.” There was no doubt that the Government had agreed to pay interest under this contract; the majority chose to draw a line in that agreement. Perhaps it could be explained that contractual waiver of this immunity rule had to be clearer, but this too involved independent decision making. Judge Newman stated that the majority “uncritically expanded” sovereign immunity, making it a “tool of unfairness.”⁶¹⁴ Similarly, in *Mola Development*, the majority chose to distinguish *Winstar*, finding that only regulatory action, not a contractual commitment, was involved in the alleged breach by FIRREA.⁶¹⁵ This decision, effectively to follow the lead of the dissent in *Winstar*, was not compelled by *Winstar*.

Even in *Maropakis*, where the majority insisted that it was bound to rule “in the sovereign’s favor,” the reality is that it did not have to make a claim out of a defense. *Webster’s Dictionary* defines “defense” as “a defendant’s denial, answer, or plea” or “the collected facts and method adopted by a defendant to protect and defend against a plaintiff’s action”—with no mention of “claim.”⁶¹⁶ *Black’s Law Dictionary* defines “defense” as a “defendant’s stated reason why the plaintiff . . . has no valid case”—also with no mention of “claim” (in more than two pages of additional definitions).⁶¹⁷ The CDA had plainly given the sovereign’s consent to *Maropakis’* appeal from the final decision asserting the government claim, a right that should not have been emasculated by attributing an abnormal meaning to “defense.” Even a strict construction requires a reasonable basis, consistent with the purpose of the waiver.⁶¹⁸ Indeed the

612. See discussion *supra* Section III.P.

613. See discussion *supra* Section III.O.

614. *Contel II*, 384 F.3d 1377, 1383 (Fed. Cir. 2004).

615. See discussion *supra* Section III.S.

616. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 326 (11th ed. 2003).

617. BLACK’S LAW DICTIONARY 482–85 (9th ed. 2009).

618. See, e.g., *Smith v. United States*, 507 U.S. 197, 203 (1993) (“We should have in mind that the [Federal Tort Claims Act] waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended.” (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979))).

Federal Circuit's prior experience in *Reflectone, Inc. v. Dalton* of having awkwardly to back down on, and leave open questions about, applications of its controversial CDA "jurisdictional prerequisites" makes its choice even more surprising.⁶¹⁹

2. The Sub-sovereignty Cases

One would think that, where *Merrill, Richmond*, and *Hercules* have no potential precedential bearing, the rule mandated by *Winstar* and *Mobil Oil* would operate freely, and the Federal Circuit would provide a level playing field between the sovereign and its contractors. And, further, that the court would without hesitation seek to serve its historic mission of holding the Government accountable as the law would hold private individuals. Judge Newman's dissents demonstrate that neither appears to be the case.

These decisions come in differing forms, but they present noteworthy aspects. Most significant is the bottom-line effect that the Government avoids accountability and the public fisc is protected. The reasons vary, but invariably an obstacle is found. In *Emerald*, the majority inexplicably threw out the contractor's claim for increased costs due to government revision of a defective government wage determination, ignoring prior precedent and a procurement regulation specifically placing responsibility on the contractual Government and requiring compensation.⁶²⁰ In *Wilner*, the contractor could not rely on evidentiary admissions by the Contracting Officer, based on the majority's insistence that the de novo CDA proceeding precluded such rebuttable evidence, notwithstanding the obvious admissibility of such evidence in de novo litigation of contract disputes between private citizens.⁶²¹ Later, in the second *Grumman* decision, this rule against government evidentiary admissions was anomalously applied to a damages claim with the curious explanation that the contractor had the burden of proof.⁶²²

It is also a recurring point of Judge Newman's dissents that the majority opinions deny the contractor its "day in court" by cutting off consideration of facts supporting the claim against the Government. The majorities avoided the facts not only by denying jurisdiction (as discussed previously) but also by interposing doctrinaire notions of law. Thus, in *GAF*, summary judgment cut off evidence of the Navy's unique knowledge and cover-up of hazards of asbestos in its shipyard work.⁶²³ In *Amertex*, Judge Newman criticized the majority for freeing the Government of accountability, and thus not considering facts indicating a cardinal change, based on accord and satisfaction, even though there was not, in fact, a release of the claim.⁶²⁴ In the second *Grumman* dissent,

619. 60 F.3d 1572, 1583 (Fed. Cir. 1995) (overruling *Dawco Constr., Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991)).

620. See discussion *supra* Section III.B.

621. See discussion *supra* Section III.E.

622. See discussion *supra* Section III.R.

623. See discussion *supra* Section III.A.

624. See discussion *supra* Section III.H.

she lamented the majority's unwillingness to consider government nondisclosure of knowledge of the incumbent's prior performance and \$100 million higher bid, saying that government contracting is not "a game of gotcha."⁶²⁵

Judge Newman's focus on the facts—and her colleagues' resistance to them—is strikingly drawn in decisions dealing with the most pervasive contract issue: how to interpret contracts. The majorities, adopting their own reading of contract language and relying on the "plain meaning" rule, barred consideration of facts indicating the parties' actual intent.⁶²⁶ This preclusion of extrinsic evidence occurred in *Bell BCI*, where the "plain meaning" reading was unnecessary if not dubious, and completely contradicted by the COFC findings of fact as to the parties' intended meaning.⁶²⁷ And in *Dalton v. Cessna Aircraft Co.*, where language ambiguity was deemed patent, the majority imposed on the contractor a pointless duty of inquiry, even where the unreviewed extrinsic evidence showed that the parties had discussed and agreed on the contract's meaning consistent with the contractor's claim.⁶²⁸ What was worse than ignoring the facts, in Judge Newman's view, was that the majorities, in reversing the trial forums and denying government accountability, had disregarded the findings of fact made below.

The Federal Circuit's indifference to the facts of government conduct or commitments, as reflected in *GAF*, *Grumman*, *Bell BCI*, *Cessna*, and other cases, is difficult to explain, particularly for a court charged with holding the Government accountable.⁶²⁹ Perhaps it is a spillover from Chief Justice Rehnquist's unwillingness in *Hercules* to let the trial forum decide whether there was an implied-in-fact obligation—the very "practical effect" that Justice Breyer feared would make it difficult "for courts to interpret Government contracts with an eye toward achieving the fair allocation of risks that the parties intended."⁶³⁰

These cases, though they involve no potential sovereignty issues, also reflect a surprising disinclination to hold the Government accountable under "the law of contracts between private individuals." One would have expected a court responsible for government accountability to have latched onto the mandate of *Winstar* and *Mobil Oil*. But the Federal Circuit has not, as Judge Newman's dissents show.⁶³¹

625. *Grumman II*, 497 F.3d 1350, 1360 (Fed. Cir. 2007).

626. For a tracking and analysis of the "plain meaning" doctrine at the Federal Circuit, see W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the Federal Circuit*, 34 PUB. CONT. L.J. 635 (2005).

627. See discussion *supra* Section III.T.

628. See discussion *supra* Section III.G.

629. It is also impossible to square with the Federal Circuit's willingness to engage in appellate factual speculation in its second *AT&T* opinion over Judge Newman's dissent. *AT&T II*, 177 F.3d 1368 (Fed. Cir. 1999); see discussion *supra* Section 0. This speculation supported the conclusion that the contractor had waived its claim in a case without a trial record. See *id.*

630. *Hercules II*, 516 U.S. 417, 441 (1996) (Breyer, J., dissenting).

631. As do other decisions. For example, see the four cases discussed in W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of*

For example, the Federal Circuit's "plain meaning" approach to contract interpretation, illustrated by *Bell BCI*, is inconsistent with the Restatement. The majority said it was applying Restatement law to the interpretation of an alleged release and then promptly disregarded it.⁶³² The majority also disregarded special contract law principles for interpreting releases and determining an accord and satisfaction, both of which require examination of facts indicating what the parties intended to release and resolve.⁶³³

It is also an indication of the court's disinterest in the general law between private individuals that in both *Bell BCI* and *Amertex*, the Federal Circuit effectively concluded that the contractors had forfeited their claims. As is well known, the general law "abhors" a forfeiture, which, for example, explains why releases are usually strictly construed and "subject to explanation as to the subject matter of accord and satisfaction."⁶³⁴ In *Cessna*, the doctrinaire duty of inquiry where the parties had in fact resolved the issue effected a forfeiture, and in *AT&T* the speculative waiver would have done so. In *Wesleyan* the court's contract construction forfeited the contractor's property rights.⁶³⁵ In contrast to "basic contract law principles," it seems fair to say—from these decisions and others⁶³⁶—that the Federal Circuit has no hesitancy to find, indeed to look for, a forfeiture of claims against the Government.

In these cases, the Government's obligations should have been determined under the general contract law but were not. They did not in any way raise issues of sovereignty law and had no commonality with *OPM v. Richmond, Merrill*, or *Hercules*, except that they all involved the sovereign's money. It seems that the Federal Circuit has not yet come to grips with the *Winstar* and *Mobil Oil* rulings.

Contracts Between Private Individuals, 32 PUB. CONT. L.J. 677 (2003). Judge Newman participated in three of these decisions, dissenting in one, *Johnson Management*, but joining in two opinions, apparently not finding them unjust. See *Johnson Mgmt. Grp. CFC, Inc. v. Martinez*, 308 F.3d 1245, 1257 (Fed. Cir. 2002).

632. See *Bell BCI III*, 570 F.3d 1337, 1341 (Fed. Cir. 2009). This is not the only instance where the Federal Circuit said it was following the Restatement but actually did not. In *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1245–46 (Fed. Cir. 2007), the court invoked the *Winstar* rule and the Restatement (Second) of Contracts, sections 163 and 164, but deviated from them by holding that fraudulent inducement rendered a contract "void ab initio," not just "voidable."

633. *Bell BCI III*, 570 F.3d at 1341. It is also difficult to square the language-based resolution of *Bell BCI II* with *Amertex*, where an accord and satisfaction was found *without* release language.

634. See, e.g., *L.W. Packard & Co. v. United States*, 66 Ct. Cl. 184, 192 (1928); see also FARNSWORTH, *supra* note 524, at 435, 442 (discussing "judicial aversion to forfeiture" and interpretive preference against forfeiture, respectively).

635. See discussion *supra* Section III.P.

636. In *West Coast II*, discussed above in Section III.F., the majority effected a forfeiture by retrospectively applying its correction of COFC precedent, contrary to Supreme Court standards cited by Judge Newman in dissent. 39 F.3d 312, 318 (Fed. Cir. 1994) (Newman, J., dissenting); see, e.g., *Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee*, 389 F.3d 1243, 1249 (Fed. Cir. 2004) (forfeiture of rights to patent where Government knew, but contractor did not use specified disclosure form).

V. CONCLUSION

In conclusion, it might be said that the significance of Judge Newman's dissents lies inherently in the principles of fairness and justice that she has steadily championed. It is hard not to admire a judge who eloquently admonishes "tools for unfairness" and "travesties" of justice and argues for a "national policy of fairness to contractors."⁶³⁷

But the greater significance lies in what her dissents tell us about the court itself. From this collection of cases, it is a fair conclusion that, whether prompted by Supreme Court precedents or just influenced by them, or whether by its own "decisional attitude," the Federal Circuit has made protection of the public fisc its priority. Plainly, the decisions show that it is no longer considered a priority or "special responsibility" of the court "to make government officials accountable to the citizens whose servants they are"⁶³⁸ or for the Government "to render prompt justice against itself."⁶³⁹ And thus, sad to say, the court no longer defines "its mission" as "hold[ing] and speak[ing] a nation's conscience."⁶⁴⁰ Judge Newman's dissents speak for a frustrated national conscience.

637. *See Contel I*, 384 F.3d 1372, 1383 (Fed. Cir. 2004).

638. Nash, *supra* note 609.

639. COWEN ET AL., *supra* note 4, at 170.

640. *Id.* at 171.